

DRAFT

ADVISORY COMMISSION ON INTERGOVERNMENTAL AFFAIRS (ACIR) MANDATES
REPORT: LABOR ISSUES

Summary of DOL Concerns: ACIR continues to ignore the Congressional directive to consider the impact of state and local mandates on working men and women. In the report:

*The recommendations concerning the Federal Labor Standards Act (FLSA) demonstrate a lack of understanding of the requirements placed on Federal Agencies by Title 5, USC as the recommendation would result in additional burdens on local and state government.

*The comments related to the Family and Medical Leave Act (FMLA) disregard several relevant findings of the Commission on Family and Medical Leave.

*Recommendations related to the Occupational Health and Safety Act (OSHA) call upon the Federal government to take on basic state and local government responsibilities and comments related to OSHA standards are unsupported.

* The Davis Bacon recommendations would be detrimental to basic worker protection and they would complicate the application of Davis Bacon requirements.

Fair Labor Standards Act

ACIR Recommendation: Retain state and local government coverage under the Fair Labor Standards Act, but amend the Act to allow state and local governments' compliance with either the policies of the Act or the comparable policies of the federal government under Title 5, USC.

DOL Response:

*ACIR implies that Federal agencies have a lesser standard to meet in terms of employment standards; however, federal agencies are required to comply with both FLSA and Title 5. If the recommendation is to require the same standards for state and local government employees as are required for Federal employees, the effect would be to place additional regulatory requirements on state and local governments which presently do not exist.

*ACIR ignores the steps which both Congress and the Labor Department have taken in order to address particular problems related to state and local governments. For example:

- * there are special overtime standards for law enforcement and firefighting personnel and "comp time" provisions.

- * special accommodations were included in regulation changes in 1992 that allow state and local governments to continue to claim exemption from overtime for their executive, administrative and professional employees despite the fact that they account for leave on an hour-for-hour basis or that they have systems requiring them to make partial-day deductions from pay when accrued leave has been exhausted.

- * the Department of Labor investigates state and local governments essentially on a complaint-only basis.

- * the Department of Labor will not file suit against a state or local government to enforce the FLSA unless at least 30-days advance written notice has been given that the pay practices are in violation.

Family and Medical Leave

ACIR Recommendation: Retain state and local coverage under the Family and Medical Leave Act.

DOL Response:

*While ACIR recommends continued coverage for state and local employees, the ACIR reports states that the Family and Medical Leave Commission's study did not survey public agencies. The report however fails to point out that the Employee Survey was a nationally representative sample of public and private sector workers.

*In addition, a separate survey of state family and medical leave policies specifically asked whether public agencies had encountered difficulties in applying the FMLA special rules for employees of schools. For states that had their own family or medical leave provisions, local school administrators state that they encountered no problems in reporting to both state and federal enforcement entities.

*The ACIR report suggests that Federal agencies have more flexibility than state and local governments in the implementation of FMLA; however, unlike the Federal government state and local governments have the authority to:

- * deny restoration to certain highly compensated individuals.
- * require certifications by health care provider if the employee claims they are unable to return to work because of a

specified condition.

* entitled to recover premiums paid for maintaining health benefits coverage during the period of unpaid leave if the employees fails to return to work for reasons related to health or other circumstances beyond the control of the employee.

Occupational Safety and Health Act

ACIR Recommendation: Make no changes in Occupational Safety and Health Act (OSHA) language regarding state and local government compliance, but increase federal funding sources for state and local government training and technical assistance on OSHA requirements as well as funding for implementation of requirements.

DOL Response:

*Safe workplaces are a fundamental obligation of all employers and the Federal government should not be expected to finance safe work places for state and local governments.

*The ACIR report states that there is a "lack of credible information on the rationale for or the scientific basis of many OSHA standards and requirements." It is irresponsible for ACIR to make this statement and to offer no documentation or even one regulation or standard as an example.

Davis-Bacon Related Acts

ACIR Recommendation: Amend the related laws to exempt projects below a higher dollar threshold than exists in most laws and consider exempting projects in which federal participation is a low percentage of total project costs.

DOL Response:

*The Administration has supported bi-partisan reform legislation in the House and Senate to increase dollar thresholds and to reduce the level of paperwork and record keeping requirements.

*The ACIR proposal of adding the percentage threshold to the Davis-Bacon requirements would be detrimental to fundamental worker wage protection. In addition, it would further complicate the administration of Davis-Bacon as it would increase the level of uncertainty as to when and which projects would be subject to

Davis-Bacon.

*The ACIR report suggests that there is often a conflict between Federal Davis Bacon and state prevailing wage laws. This conflict is "inappropriately detrimental to intergovernmental comity." Without specific examples it is difficult to rebut the ACIR assertion, except to note that the Davis Bacon statute is a longstanding Federal law with a simple threshold mechanism. In addition, most state prevailing wage statutes were written to complement and build upon the Federal statute.

STATEMENT ON UNFUNDED MANDATES REPORT

by

Marcia Hale
Asst. to the President for
Intergovernmental Affairs

-- DRAFT --

The Clinton Administration has a strong record on unfunded mandates. We pushed for passage of the Unfunded Mandates Reform Act that called for this report. I had hoped the Commission's work would help us think more clearly and constructively about unfunded mandates. All of us are searching for ways to better address state and local governments' concerns while meeting the goals embodied in Federal statutes. Regrettably, the Administration cannot support the report for reasons I'll state in a moment.

Before turning to the report, I want to emphasize to the significant action the Administration has taken to address state and local government concerns about unfunded mandates. The President signed Executive Order 12875 during his first year in office to ensure that new regulations do not place undue burdens on states and communities. In March of 1995, he signed the Unfunded Mandates Reform Act. In March of this year we reported to Congress on the significant progress Federal agencies have made in implementing the Act. The Administration has also worked cooperatively with state and local governments to help them take full advantage of the flexibility that already exists in many Federal statutes.

Unfortunately, the Commission's draft final report doesn't move us forward.

As you know, the Unfunded Mandates Reform Act directed this Commission to:

- o establish a framework for analyzing and discussing mandates;
- o review the role of Federal mandates in intergovernmental relations;
- o develop measurement tools for evaluating mandates;
- o examine the impact of unfunded state mandates on local governments; and
- o identify specific mandates that should be addressed.

This is a tall order, and as you know the Commission had

limited resources. Regrettably, the Commission has focused on specific mandates without establishing a clear framework for analysis. Further, the Commission did not consider the views of working men and women in its assessments as directed by Congress. As a result, ACIR's recommendations do not reflect a balanced or careful consideration of the issues.

For example, the report discusses the costs to states and local governments of citizen suit provisions. It also calls for a study of such laws. Then, without any discussion of the success such provisions have had in ensuring full implementation of critical federal statutes, the report recommends that Congress hold hostage all legislation with such provisions until the study is completed. In other words, based on a one-sided analysis, the report suggests we ask Congress not to make any changes in the Safe Drinking Water Act, the Individuals with Disability Education Act, Medicaid law, and a myriad of other statutes until another Commission has studied the issue.

The Administration cannot support this approach. Citizen suits have proved highly beneficial in ensuring Federal statutes are implemented as intended by Congress.

In this and other areas of the report the Commission has simply overreached while failing to complete first things first. The report contains a series of recommendations that are not well supported and does not meet Congress's charge that it provide a framework for looking at unfunded mandates in a coherent and balanced way.

The Administration commented extensively on the previous draft ACIR report. We appreciate the Commission's hard work in making revisions to the draft that incorporate many of our comments. Nevertheless, we regrettably cannot support the current draft for the reasons outlined above and discussed in more detail in my July 3 letter to Governor Winter. There is no easy way to amend the draft given its fundamental shortcomings. We therefore urge the Commission to vote to disapprove it without amendments.

I know the members of this Commission share my and the President's commitment to making further progress in addressing unfunded mandates and improving intergovernmental relations. The Commission has produced a number of reports that have improved our understanding of intergovernmental relations and have led to real improvements in Federal policy as it affects state, local and tribal governments. The Administration has appreciated the ACIR's contributions.

I look forward to continuing this dialogue on unfunded mandates beyond the work of this Commission.

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Executive
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SPECIFIC
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DEBATE



United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, D.C. 20240

March 1, 1996

The Honorable William F. Winter
Chairman
U.S. Advisory Commission
on Intergovernmental Relations
800 K Street, NW
Suite 450, South Building
Washington, DC 20575

Dear Governor Winter:

I am writing to convey serious concerns that the preliminary ACIR report reflects clear misunderstandings about the Endangered Species Act (ESA) and fails to acknowledge substantial reforms put forward by the Clinton Administration in making the law work more flexibly for States, local government and private landowners.

Fundamentally, we question the characterization of the ESA as an unfunded mandate. The ESA mandates only that each Federal agency ensure that its Federal actions are not likely to jeopardize the continued existence of threatened or endangered species. The ESA's only other regulatory provision prohibits anyone from killing or injuring individual threatened or endangered animals without authorization. Neither of these provisions constitute unfunded mandates.

The ACIR preliminary report summary recommends that "exemptions to the ESA should be applied more extensively," among other suggestions. Regrettably, more extensive use of the ESA's exemption process necessarily means that more endangered wildlife will become extinct. More extensive use of the ESA's exemption process is not necessary to balance conservation and economic concerns. In fact, the record to date shows from 1987-1995, only 0.3% of development projects were stopped as a result of the ESA consultation process, so it is fair to conclude that economic development objectives have almost always been met within the context of the ESA.

Perhaps more disturbing, the report fails to acknowledge unprecedented reforms advanced by the Administration to minimize economic consequences and increase flexibility of the ESA. Our efforts include regional conservation solutions such as the Pacific Northwest Forest Plan, the California Bay-Delta Accord, regional conservation planning in southern California, southern Utah and throughout the Southeast -- all developed in close cooperation with State and local governments. Across the country, more than 200 Habitat Conservation Plans

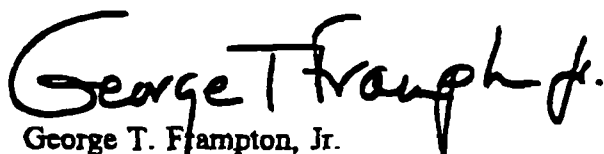
(HCPs) are under development with private landowners as a means of balancing conservation and development objectives. We have established "safe harbor" agreements that provide incentives to sustain wildlife habitat and provide regulatory certainty for private landowners. We have also built partnerships with States in endangered species candidate conservation and recovery programs, implemented uniform "peer review" procedures to ensure that every listing and recovery program is reviewed by independent scientific experts, and developed regulatory relief for small landowners.

There are a number of recommendations included in the ACIR report that reflect reforms we have already put in place. The ACIR report, for example, calls for additional funding and the Administration has consistently provided additional outlays in our budget proposals for State recovery and habitat conservation efforts including more than \$18 million for State habitat acquisition efforts in FY1996, which was eliminated by Congress.

Finally, there are several mischaracterizations of the regulatory provisions of the ESA within the ACIR report that include inaccurate representation of Section 9 prohibitions on "taking" of species. "Critical habitat" is also mischaracterized here as an automatic mandate rather than a standard in conservation of threatened or endangered species that may require special management considerations or protection by Federal agencies. Federal agencies do not have authority to target state parks for protection and recovery efforts. The only obligations that these non-Federal entities have under the ESA are those that every person and entity in this country has to not kill or injure individual threatened or endangered animal without proper authorization. They may, and sometimes do, voluntarily participate in Federal conservation objectives where the objective is to avoid regulation on private landowners.

In conclusion, we have demonstrated an unparalleled record in making the ESA work more flexibly for States, local government, and private landowners. We are interested in creating partnerships with ACIR to advance these efforts, however, it is important that we move forward with a common understanding of the ESA as well as with common objectives.

Sincerely,



George T. Frampton, Jr.
Assistant Secretary for
Fish and Wildlife and Parks

THE WHITE HOUSE

WASHINGTON

July 19, 1996

INFORMATION

MEMORANDUM TO THE PRESIDENT

FROM: Marcia Hale *MH*
Carol Rasco *CR*
Sally Katzen *SK*

SUBJECT: Pending Vote on the Advisory Commission on Intergovernmental Relations'
(ACIR's) Unfunded Mandates Report

I. SUMMARY

The Advisory Commission on Intergovernmental Relations (ACIR), chaired by Governor Winter, will vote on a final report on unfunded mandates Tuesday, July 23, 1996. The Administration commented extensively and critically on previous drafts of the report. Although this draft addresses some of our previous concerns, the three Administration officials on the Commission -- Marcia Hale, Secretary Riley, and Administrator Browner -- will oppose the report and are urging other members to oppose it. The decision to oppose the report was difficult; the vote is likely to be close and partisan. Governor Winter may call you between now and Tuesday to discuss the report.

II. DISCUSSION

Background

The Unfunded Mandates Reform Act directed ACIR to "review the role of Federal mandates in intergovernmental relations," including establishing a framework and measurement tools for evaluating mandates and identifying specific mandates that should be addressed. ACIR circulated a draft report last spring. On March 1, 1996, Marcia Hale wrote to Governor Winter stating the Administration's strong objections to the report. The draft report: (1) did little to further understanding of fundamental questions such as how to measure the costs and benefits of mandates or how state mandates affect local governments; (2) presented one-sided, misleading analyses of 14 Federal health, safety, environmental, worker protection, and civil rights laws and recommended unacceptable changes to most of these laws; and (3) failed in its analyses to consider the views of or effects on working men and women as directed by Congress.

Reasons for Opposing Report

The new report still fails to respond to the broad questions the Congress posed to

ACIR about unfunded mandates. It remains a one-sided report that in places inaccurately characterizes requirements of current statutes and our approach to implementing them. The final draft recommends more moderate but still unacceptable statutory changes to provide relief to state and local governments while failing to adequately consider the effect of those changes on citizens and the environment. For example, the report proposes to:

- o Amend the Individuals with Disabilities Education Act and significantly increase Federal funding (disability and civil rights groups oppose this recommendation; we have argued that civil rights statutes are exempt from consideration by ACIR);
- o Amend Davis Bacon-related laws (requiring prevailing wages be paid to employees under certain federally-funded contracts) to consider exempting projects in which federal participation is a lower percentage of total project costs (labor opposes).
- o Amend the Fair Labor Standards Act to allow state policies to be consistent with either with current law or with comparable policies that currently apply to the Federal government only (labor groups oppose);
- o Amend the Clean Water Act to allow EPA to extend compliance deadlines on a case-by-case basis (environmental groups oppose);

The report also:

- o recommends a commission study laws that provide private rights of action against state and local governments before Congress reauthorizes any existing statutes (e.g. environmental laws) with such provisions or enacts any new statutes with such language (labor, environmental, and civil rights groups oppose); and
- o to mitigate what ACIR characterizes as costly mandates, recommends increased Federal spending and/or technical assistance for 6 statutes and recommends new Federal bureaucratic structures to assist states.

It was our hope that ACIR would provide a context in which to consider ways to further address state and local governments' concerns while maintaining our commitment to national objectives. We recognize that a vote against the report could be viewed as a vote against the states and for "unfunded mandates." We nevertheless feel that the report presents a one-sided, fundamentally flawed analyses and that we should not support it.

You have a strong record on unfunded mandates. You signed Executive Order 12875 during your first year in office to ensure that new regulations do not place undue burdens on states and communities. In March of 1995, you signed the Unfunded Mandates Reform Act. In March of this year we reported to Congress on the significant progress Federal agencies have made in implementing the Act. The Administration has also worked cooperatively with state and local governments to help them take full advantage of the flexibility that already exists in many Federal statutes. As ACIR concludes its work, we will work to ensure that your record and our reasons for opposing the Commission's report are well understood.

EPA Draft
7/5

Honorable Governor Winter
Chairman
U.S. Advisory Commission on
Intergovernmental Relations
800 K Street, N.W.
Suite 450, North Building
Washington, D.C. 20575

Dear Governor Winter:

Administrator Carol Browner has asked that I respond to your recent request for comments on the June 25, 1996 *Draft Report on the Role of Federal Mandates in Intergovernmental Relations*. We have put forth our best effort to review the revised draft, even though we were given less than a week to respond. In order to meet your deadline, I wanted to give you some initial thoughts and to highlight some areas where we have major problems. Regrettably, because of the extremely limited time frame provided for review and comment between receipt of the draft and distribution of revised material to all Commission members, we have once again not been able to give this draft the time and attention it requires prior to the meeting.

Although the current draft of the report represents a definite improvement over the first draft, it remains unacceptable in its present form. The report still fails to fulfill the fundamental charge given the ACIR in the Unfunded Mandates Reform Act (UMRA): to investigate and review the role of federal mandates in intergovernmental relations and their impact on government objectives, the private sector, and the nation's citizens. In addition, as described below, many of the key issues raised in our March 5 letter to you and in extensive material shared with the ACIR staff also remain.

^{demands?}
Perhaps most troubling is that the tone of the report continues to lack balance. The failure to address benefits in the report creates an inevitable imbalance in the presentation of this complex issue. As stated in Administrator Carol Browner's letter of March 5, 1996 to you and my letter to Commission staff dated June 23, 1995, UMRA charged the Commission with considering not only the problematic aspects of mandates, but the beneficial aspects as well. Despite the Commission having voted explicitly to instruct the staff to address benefits as well as problem, this draft of the report again fails to discuss benefits in a serious way.

For example, the draft makes no mention of the tremendous health benefits associated with the Clean Air Act. The Clean Air Act has had tremendous, well-documented beneficial effects. Of the 98 areas of the country originally designated as "non-attainment" areas for ground-level ozone, 55 of those now have clean air and 22 have formally been redesignated to "attainment". As a result, 140 million people now live in areas where they experience reduced mortality, reduced airway resistance among asthmatics, and reduced respiratory illness. Emissions of particulate matters have been cut 78%, carbon monoxide by 25%, and smog-forming volatile organic compounds by 24%. All of this has been accomplished while the domestic economy has grown by 71% and the U.S. population by 25%.

With regard to the Clean Water Act, the report does not capture the high value the public places on clean water and their expectation that government will be practical but protective in ensuring air and water quality. While any undertaking as complex as protecting water quality will generate some disagreement and uncertainty, this draft of the report seems to identify minor issues needing attention without acknowledging the dramatic success of the Clean Water Act to date.

Similarly, no mention is made of the benefits associated with the Safe Drinking Water Act. Prior to passage of the Safe Drinking Water Act (SDWA), a Congressional study found that only 10 to 15% of water systems conducted adequate testing for microbiological safety; that one-third of systems that tested found contamination exceeding the voluntary standards then set by the U.S. Public Health Service, and that 565 of systems had physical deficiencies that could seriously affect safety. Today, in contrast with the record of limited compliance with the 21 voluntary PHS standards, about 70 percent of systems fully comply with today's more protective SDWA standards.

We were disappointed that information such as this was not included in this draft of the Commission's report despite our efforts to supply it to ACIR staff. Failure to include a discussion of the beneficial aspects of a mandate necessarily focuses the reader only on the negative attributes of federal mandates, inevitably creating an unbalanced tone.

Moreover, this version of the report also fails to acknowledge innovations the federal agencies have instituted since the President signed Executive Order 12875 on Enhancing the Intergovernmental Partnership and passage of UMRA. For example, one of the recommendations calls for desk officers to be assigned for each state as a single point of contact. EPA has in fact instituted such a practice. By recommending such changes but not recognizing where such practices already exist, the perception of a persistent problem is perpetuated when in fact credit for implementing a solution should be expressed. *Self-serving*

Another major concern has to do with the "Common Issues" section. We continue to have strong concerns about one of the common issues identified in the report -- the authority of citizens to go to court to assure enforcement of laws to protect their health and the environment. We fundamentally disagree with the staff analysis presented in the July draft. The ACIR's own statistics reinforce our experience at EPA that citizen suits to enforce environmental laws have not imposed a significant burden overall on state, local, and tribal governments. As the examples

acknowledged

cited in our March 5, 1996 letter demonstrate, citizen suits can be very important in the rare instances where a government has exhibited an egregious failure to act to protect public health or the environment. Congress has explicitly empowered citizens to take action where the federal or state governments have failed to do so. Citizen suits are a critical check not only on state and local governments, but also on the federal government. [We see no value in establishing yet another federal commission to study this matter.]

*
conflict
w/ HALE
letter

We also have serious concerns about other aspects of the "Common Issues" section. For example, confusion about the boundaries between federal and state responsibilities was frequently identified in written comments to the Commission as a major problem plaguing local governments. Yet that issue is just touched upon and the draft implies that the federal government is responsible for "fixing" the problem when it seems more reasonable to suggest that a joint solution is warranted. This draft of the report also introduces several new recommendations that could prove extremely problematic in practice for all parties involved and should be deleted, such as the recommendation for a binding arbitration process.

In addition to the problems of tone and the general issues raised above, we continue to have many concerns about the statute-specific recommendations in the June 25 draft. Although the current draft of the report is substantially improved from the earlier one, significant problems remain. One area of concern with the statute-specific recommendations is that the "Recommendation" and "Recommendation Rationale" sections do not logically follow from the issues raised in the "Intergovernmental Concerns" section. For example, in the Clean Water Act discussion, the majority of issues raised pertain to small communities, yet none of the recommendations pertains to small community issues. For both editorial and substantive reasons, this problem needs to be corrected.

Another area of concern pertaining specifically to the Clean Water Act has to do with the draft's recommendation that EPA be given authority to extend compliance deadlines on a case-by-case basis. EPA and states now negotiate such extensions with individual communities through administrative orders, permit conditions, or state alternative compliance agreements with small towns. They are able to do so within the existing statutory framework, which affords sufficient flexibility but that also preserves the need for fairness across communities. The recommendation to amend the Act to deal with compliance deadlines is ill-advised and should be deleted.

Similarly, while the Safe Drinking Water Act section of the report has been significantly improved, problems remain. The recommendation is very time-specific and has not been updated to reflect recent bi-partisan legislative activities in the House. It seems much more sensible for the report to make recommendations to address specific problems that have been identified: the need to address the high per capita costs of small systems, to allow EPA to examine health effects and occurrences of specific contaminants in determining priorities for standard-setting and to consider costs and benefits in standard-setting, to provide more implementation authority for states and to provide federal financial assistance for drinking water to states and localities.

We are also concerned about several specific parts of the draft report that are misleading or erroneous. For example, the draft suggests that federal laws compelled states to "cede control over water pollution" (the last three lines of p.18). That is just not the case. Water quality protection is an intergovernmental effort, including in the area of financing sewage treatment projects. States have not "ceded control" over water pollution to the federal government; it is and always has been a partnership. The report also erroneously suggests that the EPA is requiring communities to attain "zero discharge" of pollutants and that there has been a "phase out" of federal financial assistance. These sorts of statements need to be deleted from the report altogether.

The draft also includes multiple other technical errors that warrant correction to avoid confusion and misinterpretation, such as the way the text discusses pollutants from stormwater discharge, toxic pollutants from sewage sludge, and descriptions of federal funding levels.

Although we agree with the draft report's recommendations to make no changes in the Clean Air Act and to continue to support federal funding and technical assistance to ensure that EPA and the States can meet the requirements of the Clean Air Act Amendments of 1990, this section continues to suffer from serious problems noted: it ignores progress resulting from the presence of the federal role in these policy areas.

In summary, while this draft represents an improvement over the March 1996 version, significant problems remain. We have provided examples of the problems we identified in the short period we had for review, but have not in any way been able to provide a complete analysis or proposed revisions. As you know, we commented extensively on the previous draft. I regret that we cannot support the current draft, especially given the hard work and long hours I know has been put into this revision by both the ACIR and our EPA staff.

As you know, EPA is committed to building strong and effective working partnerships with state, local, and tribal governments, and we are making great progress in fulfilling that commitment. We also remain committed to working with ACIR to maintain the reputation it has had for producing solid analysis that advances open and honest public debate and understanding. Therefore, we would have to strongly urge that the ACIR Commissioners reject the current and previous draft of the report. While improvements have been made, significant weaknesses and problem areas remain.

Administrator Browner, Deputy Administrator Fred Hansen, and I remain ready to assist you as you feel appropriate in this effort. Please feel free to call any one of us if you would like to discuss this issue further.

Sincerely,

Shelley H. Metzenbaum
Associate Administrator

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cc. Carol M. Browner, Administrator
Fred Hansen, Deputy Administrator

ENVIRONMENTAL PROTECTION AGENCY
REGIONAL OPERATIONS/STATE/LOCAL RELATIONS

DATE: July 10 - 96

To: Who ever was on

NAME: the ACIR Conference Call

ORGANIZATION: _____

FAX NUMBER: 456 - 7028

PHONE NUMBER: _____

FROM: Anna Raymond

for
SHELLEY METZENBAUM, ASSOCIATE ADMINISTRATOR
OFFICE OF REGIONAL OPERATIONS & STATE/LOCAL RELATIONS

PHONE: (202) 260-4719

FAX: (202) 260-2159

TIME: 4pm

TOTAL NUMBER OF PAGES: 12

SUBJECT: ACIR

MESSAGE: Copy of EPA - Carol Browner

Letter to ACIR re: final rept.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUL 09 1996

THE ADMINISTRATOR

The Honorable William F. Winter
Chairman
U.S. Advisory Commission on
Intergovernmental Relations
800 K Street, N.W.
Suite 450, North Building
Washington, D.C. 20575

Dear Governor Winter:

Thank you for asking me to comment on the June 25, 1996 draft report of the Advisory Commission on Intergovernmental Relations (ACIR), *The Role of Federal Mandates in Intergovernmental Relations*. I regret that because of the extremely limited time provided for review, the Environmental Protection Agency (EPA) has been unable to give this draft the time and attention it requires. Thus, the comments included are illustrative of some of our concerns rather than comprehensive.

Although the current draft of the report represents a definite improvement over the first draft, it remains unacceptable in its present form. The report still fails to fulfill the fundamental charge given the ACIR in the Unfunded Mandates Reform Act (UMRA): to investigate and review the role of federal mandates in intergovernmental relations and their impact on government objectives, the private sector, and the nation's citizens. In addition, as described below, many of the key issues raised in our March 5 letter to you (enclosed) and in extensive material subsequently shared with the ACIR staff have not been resolved.

Perhaps most troubling is that the report continues to lack balance. The failure to include benefits in the report creates an inevitable imbalance in the discussion of the role of federal mandates. As stated in my letter of March 5, 1996, and Shelley Metzenbaum's letter to Commission staff dated June 23, 1995 (enclosed), UMRA explicitly charged the Commission with considering the beneficial aspects of federal mandates. Despite the Commission having voted at its June 1995 meeting to instruct the staff to address benefits as well as problems, this draft of the report again fails to consider benefits in a serious manner.

For example, the draft makes no mention of the tremendous health benefits associated with the Clean Air Act. Of the 98 areas of the country originally designated as "non-attainment" areas for ground-level ozone, 55 of those now have clean air and 22 have been formally redesignated to "attainment". As a result, 140 million people now live in areas where they

experience reduced mortality, reduced airway resistance among asthmatics, and reduced respiratory illness. Emissions of particulate matter have been cut 78%, carbon monoxide by 25%, and smog-forming volatile organic compounds by 24%. All of this has been accomplished while the domestic economy has grown by 71% and the U.S. population by 25%.

With regard to the Clean Water Act, the report does not capture the dramatic progress made in improving water quality over the past twenty years. For example, despite an increase in sewage flowing to treatment plants of nearly 30% over the past twenty years, the pollutants discharged by treatment plants declined by 36%.

Similarly, no mention is made of the benefits associated with the Safe Drinking Water Act. Prior to passage of the Safe Drinking Water Act (SDWA), a Congressional study found that only 10 to 15% of water systems conducted adequate testing for microbiological safety; that one-third of systems that tested found contamination exceeding the voluntary standards then set by the U.S. Public Health Service; and that 565 of these systems had physical deficiencies that could seriously affect safety. Today, in contrast with the record of limited compliance with the 21 voluntary PHS standards, about 70 percent of systems fully comply with today's more protective SDWA standards. Full implementation of current standards, for example, will prevent an estimated 100,000 cases of waterborne disease annually and protect an estimated 200,000 children from unsafe levels of lead in their blood.

Moreover, this version of the report also fails to acknowledge innovations federal agencies have instituted since the President signed Executive Order 12875 on Enhancing the Intergovernmental Partnership and since passage of UMRA. As detailed in the Administration's recent report to Congress on its implementation of UMRA, EPA and other federal agencies have instituted large numbers of changes such as those recommended in the draft report. By recommending such changes but not recognizing where such practices have already been implemented, the perception of a persistent problem is perpetuated when in fact credit for implementing a solution should be documented.

We also fundamentally disagree with the staff analysis, in the "Common Issues" section regarding the authority of citizens to go to court to assure enforcement of laws to protect their health and environment. The ACIR's own statistics reinforce our experience at EPA that citizen suits to enforce environmental laws have not imposed a significant burden overall on state, local, and tribal governments. As the examples cited in our March 5, 1996 letter demonstrate, citizen suits can be very important in the rare instances where a government has exhibited an egregious failure to act to protect public health or the environment. Congress has explicitly empowered citizens to take action where the federal, state, local or tribal governments have failed to do so. Citizen suits are a critical check not only on state and local governments, but also on the federal government. We do not believe establishing another federal commission to study this matter will have any value, and further believe that any delay in reauthorization of citizen suit provisions in existing statutes could have serious consequences.

Two other aspects of the "Common Issues" section deserve mention. While confusion about the boundaries between federal and state responsibilities was frequently identified in written

comments to the Commission as a major problem plaguing local governments, that issue is barely mentioned and the draft implies that the federal government is responsible for "fixing" the problem when it seems more reasonable to suggest that a joint solution is warranted. Also, the recommendations for binding arbitration could prove extremely problematic in practice for all parties involved and is not well thought through.

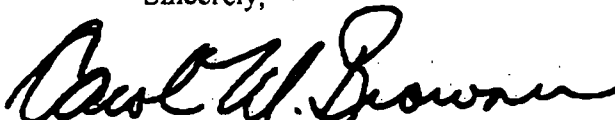
In addition, we continue to have many concerns about the statute-specific recommendations in the June 25 draft. Although the current draft of the report is substantially improved from the earlier one, significant problems remain. For example, in the Clean Water Act discussion, the majority of issues raised pertain to small communities, yet none of the recommendations pertain to small community issues. Similarly, the recommendation pertaining to the Safe Drinking Water Act has not been updated to reflect recent bi-partisan legislative activities in the House. It seems much more sensible for the report to make recommendations to address specific problems that have been identified, such as the need to address the high per capita costs of small systems. We have concern about numerous other substantive and technical statute-specific matters. Should there be further work on this report, we would be happy to provide you our specific concerns and comments rather than go into detail here.

In summary, while this draft represents an improvement over the March version, significant problems remain. We have provided examples of the problems we identified in the short period we had for review, but have not in any way been able to provide a complete analysis or proposed revisions. As you know, we commented extensively on the previous draft. I regret that we cannot support the current draft, especially given the hard work and long hours I know have been put into this revision by both ACIR and EPA staff.

EPA is committed to building strong and effective working partnerships with state, local, and tribal governments, and we are making great progress in fulfilling that commitment. We also remain committed to working with ACIR to maintain the reputation it has had for producing solid analysis that advances open and honest public debate and understanding. Therefore, we strongly urge that the ACIR Commissioners reject the current and previous drafts of the report. While improvements have been made, significant weaknesses and problem areas remain.

We remain ready to assist you in this effort. Please feel free to call to discuss this issue with me or Shelley Metzenbaum.

Sincerely,



Carol M. Browner

Enclosure (2)



07/10/96

16:31

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

005/012

WASHINGTON, D.C. 20460

MAR 5 1996

THE ADMINISTRATOR

The Honorable William F. Winter
Chairman
U.S. Advisory Commission on
Intergovernmental Relations
800 K Street, NW
Suite 450, South Building
Washington, DC 20575

Dear Governor Winter:

I am writing to provide you with my initial comments on the preliminary staff draft of the Advisory Commission on Intergovernmental Relations (ACIR) Report: The Role of Federal Mandates in Intergovernmental Relations. As you know, both the President and I are very strongly committed to building a strong working partnership with state, local, and tribal governments. Moreover, we have — as many governors, mayors, and county officials will attest — made tremendous progress in recent years implementing that commitment by providing greater flexibility to states and localities while continuing to achieve improved environmental results.

I am, however, deeply concerned that implementation of the recommendations in the preliminary draft report would dramatically compromise public health and environmental quality. I look forward to working with you and my fellow Commissioners to craft a more balanced report on the subject of the role of federal mandates in intergovernmental relations.

I have major concerns with regard to four specific recommendations of the draft report as they pertain to environmental quality. They are:

- the recommendation to withdraw citizens' rights in the enforcement of environmental laws;
- the call for significant relaxation of water pollution control by municipalities;
- the proposed long-term goal of eliminating Federal authority to set and enforce standards for safe drinking water; and
- the proposal to limit Federal authority to assure the effective control of harmful air pollutants.

Each of these concerns is described in greater detail in enclosed papers.

I also have concerns about other recommendations included in the draft report. The proposal that health and safety standards applied to state and local government be different than those applied to private industry and the federal government is particularly troubling, as is the proposal regarding the Endangered Species Act. Also the proposal that a single federal agency be designated to make binding decisions about each mandate warrants further consideration. The solution proposed may not fix the real problem.

Furthermore, I am concerned that the way the report currently describes all of the federal mandates is imbalanced. As you may recall, the Environmental Protection Agency (EPA) raised several specific concerns at the Commission's June 28th meeting about the need to address not only the problematic aspects of the mandates, but the beneficial aspects as well. At that time the Commission agreed to look at the "beneficial effects" of each mandate, although we agreed that ACIR would not try to "calculate benefits or weigh benefits against costs." Unfortunately, this staff draft directs little attention to the beneficial effects of federal mandates. As a consequence, the report implies that federal mandates are always bad public policy.

In the next draft, to assure a more balanced discussion, the report needs to include for each of the statutes examined a discussion of:

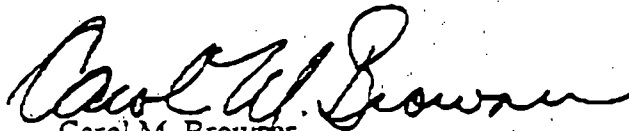
- why the federal mandate was enacted,
 - benefits results resulting from the mandate, and
 - where problems of rigidity existed in the implementation of the mandate, if and how changes have already been made to make the mandate more flexible and avoid the "one-size-fits-all" problem.
- Finally, if the ACIR report is going to assert the existence of a significant problem based on the comments it received during the preparation of the draft report, the assertion should be verified before inclusion in the report. Misinformation has seriously impaired the possibility of rational debate on unfunded mandates. For example, EPA is frequently criticized for requiring Midwestern states to monitor for pesticides currently used primarily on pineapples. The story is very misleading. The pesticide, which can cause male sterility, was used on a wide variety of crops in the Midwest and is still present in groundwater today.

The enclosed papers provide the Commission with some of the material it will need to prepare the next draft of the report. The papers discuss the beneficial effects of the three environmental laws examined and the reason enactment of a federal statute was deemed necessary. The enclosed papers also identify and correct several inaccurate or misleading assertions presented in the report. EPA will also be providing you a more detailed review of the specific language of the draft report and suggested changes.

ACIR has a long tradition of serving as an honest and open forum for identifying problems in the intergovernmental system, for formulating possible solutions to those problems, and for building intergovernmental consensus among its Commissioners in support of the proposed solutions. It has done that by focusing on facts -- by trying to separate the reality from the rhetoric. As an incumbent Commissioner, it is my hope that we can continue that tradition and deliver to the President, Congress, and the American people a far more balanced and informative report.

I look forward to working with you and the other Commissioners in this endeavor.

Sincerely,



Carol M. Browner

Enclosure



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON DC 20460

JUN 23 1995

OFFICE OF REGIONAL OPERATIONS
AND STATE/LOCAL RELATIONS

Mr. Philip M. Dearborn
Director, Government Finance Research
U.S. Advisory Commission on Intergovernmental Relations
800 K Street N.W., Suite 450 South
Washington, D.C. 20575

Dear Mr. Dearborn:

Thank you for the opportunity to comment on the Federal Register Notice published May 23, 1995, "Proposed Criteria for Reviewing and Making Recommendations on Federal Mandates." The U.S. Environmental Protection Agency commends the U.S. Advisory Commission on Intergovernmental Relations for its past efforts to illuminate the issues regarding intergovernmental mandates, and welcomes the opportunity to work with you in your new challenge to assist the President and Congress in investigating and reviewing the role of mandates in intergovernmental relations.

This agency is working to reduce unnecessary or inappropriate regulations and has, at the President's directive, recently identified over 1,400 pages of regulations to be eliminated or substantially revised. We have reached agreement with our state partners to completely revise and reform our oversight relationship with state environmental agencies. State and tribal representatives now take part in annual agency planning sessions and state, tribal and local representatives are consulted in the development of new rules by the Agency. In addition, state and local priority-setting is the heart of our Performance Partnership grant proposal for funds now going to state agencies; Project XL for communities, which would allow local priorities to be set for compliance and flexibility for communities going beyond current standards; Sustainable Development Challenge grants; and our small community compliance policy, currently under development. Provisions providing new flexibility for priority-setting based on sound science for state and local governments were included in our proposals in the last Congress for reauthorization of Superfund, Safe Drinking Water and Clean Water statutes. To the maximum extent possible, we are acting administratively to provide resources and appropriate priority-setting authority to our non-federal partners.

In all areas of Agency activities, we are conscious of the need to clearly define what activities are the appropriate province of federal, state, local, and tribal agencies; to balance the benefits and costs of specific requirements; and to implement our statutory requirements to

protect the nation's public health and environment in a way that achieves protection at reasonable cost to our governmental partners, industry, taxpayers and consumers. We would therefore like to see the Proposed Criteria expanded in several ways.

Coverage of Congressional Assignment

The proposed criteria for reviewing mandates need to be broadened. They are not encompassing enough to provide the Commission with the information necessary to sort through all issues associated with mandates and to make sound recommendations that are fully responsive to Congressional direction. Moreover, the study needs to be designed to ensure an understanding of the full scope of mandates.

The proposed "Identification" criteria chosen to screen mandates for review suggest looking only at those mandates that are perceived to:

- "significantly distort ... spending priorities,"
- "establish ... little discretion,"
- "abridge historic powers,"
- "make it difficult to implement,"
- "have been the subject of widespread objections and complaints."

While these criteria will help the Commission identify problem mandates, they will not help the Commission fulfill its full charge from Congress to investigate the "role of Federal mandates in intergovernmental relations...." To do that, we would suggest amending the study approach.

Criteria for Identifying Mandates - Suggested Changes

We suggest adding "identification criteria" that include mandates for review that are significant because of their beneficial outcomes. The five criteria proposed for selecting mandates for review are described as identifying "mandates of significant concern." It is unclear why you have narrowed the criteria to mandates of concern, rather than just mandates of significance. The statute does not seem to be limited to looking at mandates of concern only, but more generally to understanding the role of mandates, how they can be made more flexible, etc. We urge you to expand the criteria for selecting mandates so that your review will include mandates that are not only of significant concern, but rather have been, more simply, of significance.

Criteria for Formulating Recommendations - Suggested Changes

Following this winnowing, the "Recommendation" criteria then lists eleven characteristics that are to be used to screen the selected mandates for an action recommendation. These criteria do not attempt to discern the positive attributes of mandates or the rationale for their adoption by the Congress and the agencies. We suggest that once selected, mandates would be screened by an expanded set of all of criteria to consider the beneficial as well as problematic characteristics of

mandates. Any given mandate will have both problematic and beneficial attributes, and decisions regarding modifying, suspending, or terminating a mandate should be made taking all effects of the mandate into account. We would suggest that each mandate selected for intensive review be investigated for several additional characteristics, including:

- Whether it helps establish a "market" that allows more rational private sector decisions.

Many mandates are established to "internalize" costs that a single source is generating, and that the general public would otherwise have to pay. That is true for mandates on littering, effluent discharge, or airplane safety standards. By establishing a mandate, private generators of costs absorb the costs they create, rather than place them on others. Internalizing costs allows governments to let market mechanisms regulate the allocation of our society's scarce resources, rather than using "command-and-control" mechanisms. Mandates such as these also are allowing EPA and the states to test the concept of trading air and water emissions.

- Whether a mandate improves equity across businesses nationally.

Business leaders may have different values regarding their social responsibility to employees and the broader community. Some mandates have been established so that, to the extent there are costs associated with fulfilling those obligations, businesses do not end up "competing" away those obligations. Some mandates prevent us from falling to the lowest common denominator as a society.

- Whether a mandate improves equity among states.

States regularly compete to attract business, a healthy aspect of competitive federalism. While business failure in the private sector is a tolerable cost of the invaluable self-regulating mechanism of the market, it is not a viable option when states compete. Some mandates establish a floor below which states cannot compete to attract business, preventing destructive competition.

- Whether a mandate protects value for future generations.

In the absence of mandates, we rely on the "invisible hand" of the market to allocate resources to their highest potential value, enhancing our productivity and growth rate. When people are prevented from participating in market trades, the "invisible hand" does not work. Future generations cannot trade. Some mandates are established to protect the best interests of our national future.

- Whether a mandate enhances information so people and businesses can make better decisions about the trade-offs they face in their lives.

Some mandates, such as nutrition labeling requirements, SEC reports, and safety warnings, ensure that the general public, employees, and businesses have reliable information to make wise choices -- whether about what to eat for breakfast or a major acquisition.

- Whether a mandate helps business or others realize economies of scale.

Some mandates have been established because they reduce the costs to business of complying with 50 or more state (and local) standards by standardizing to a single national standard.

- Whether a mandate establishes a greater level of certainty sought by individual persons or businesses.

Some mandates provide certainty that allows business and others to make long-term investments that would be too costly in an uncertain climate.

- Whether a mandate delivers a level of protection the general public believes the government provides it.

Some mandates, such as safe drinking water standards, fulfill an unspoken expectation of the public regarding basic governmental protection. In America unlike many other parts of the world, we have long assumed the ability to travel anywhere and drink the tap water without potential harm. Departures from that standard would conflict with general assumptions of the public.

Inclusion of these and perhaps other characteristics of mandates in the ACIR analysis will allow the ACIR to make recommendations to Congress that reflect a fuller investigation of the role of Federal mandates.

Coupled Criteria and Action Recommendations

At the end of each "recommendations" criteria statement is a presumed recommendation category. These criteria contain preset recommended courses of actions. They attempt a one-size-fits-all conclusion where one may not be appropriate. In contrast, the Congress in Title I chose to establish different treatments for different types of mandates, based upon size and definition — not public perception — thus allowing flexibility based upon individual circumstances.

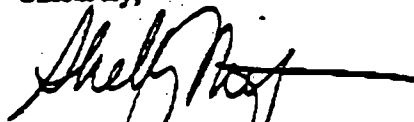
If the Commission is to adopt these "Recommendations Criteria," it is most important to decouple the categories from the recommended courses of action shown at the end of each criteria paragraph. Additionally, it is important to assume in all cases that a no-action conclusion is available as well.

Specifics

Enclosed for the information of the Commission are a number of additional comments, specific to particular criteria.

Thank you very much for the opportunity to comment.

Sincerely,



Shelley H. Metzbaum
Associate Administrator

Enclosure

THE WHITE HOUSE
WASHINGTON

July 3, 1996

The Honorable William F. Winter
Chairman
U.S. Advisory Commission on
Intergovernmental Relations
800 K Street, NW
Suite 450, South Building
Washington, DC 20575

Dear Governor Winter:

Thank you for sharing with me a revised draft of the Advisory Commission on Intergovernmental Relations (ACIR) Report: *The Role of Federal Mandates in Intergovernmental Relations*. Although the draft has improved, the revisions to it have not addressed some of the Administration's fundamental concerns articulated in my March 1, 1996 letter to you (attached). The report still fails to respond to the broad questions the Congress posed to ACIR about unfunded mandates, and instead recommends statutory changes without adequately considering the effect of those changes on citizens and the environment. Regrettably, the Administration cannot endorse the draft report.

As you know, the Clinton Administration has taken action on several fronts to address state and local government concerns about unfunded mandates. The President signed Executive Order 12875 during his first year in office to ensure that new regulations do not place undue burdens on states and communities. In March of 1995, he signed the Unfunded Mandates Reform Act. In March of this year we reported to Congress on the significant progress Federal agencies have made in implementing the Act. The Administration has also worked cooperatively with state and local governments to help them take full advantage of the flexibility that already exists in many Federal statutes.

It was our hope that ACIR would provide a context in which to consider ways to further address state and local governments' concerns while maintaining our commitment to national objectives. As you know, the Unfunded Mandates Reform Act directs ACIR to "review the role of Federal mandates in intergovernmental relations," including establishing a framework and measurement tools for evaluating mandates, identifying specific mandates that should be addressed based on that framework, and investigating the role of unfunded state mandates on local governments. Congress also directed ACIR to consider the views of and the impact on working men and women in evaluating mandates.

ACIR was unable to focus its limited resources in a way that would fulfill these objectives. As a result, we find that ACIR's recommendations do not reflect a balanced or careful consideration of the issues. The report captures states' and local governments' concerns about certain Federal laws but, as acknowledged in the report (p. 33), it does not reflect the views of the working men and women who benefit from these laws.

For example, the report discusses the costs to states and local governments, but not the benefits to the public, of citizen suit provisions. The report calls for a study of laws that provide private rights of action against state and local governments which is appropriate, but the recommendation goes on to state that pending conclusion of the study no new citizen suit provisions should be enacted nor any reauthorized nor should any statutes with such language be reauthorized (p. 7). The Administration cannot support this approach. Citizen suits have proved highly beneficial in ensuring Federal statutes are implemented as intended by Congress.

Further, the report inappropriately reviews a disability civil rights statute -- the Individuals with Disabilities Education Act (IDEA). This and other civil rights statutes do not fall within the scope of the Unfunded Mandates Reform Act. The Administration disagrees with the report's conclusion to the contrary.

Additionally, the report's recommendations have potentially significant adverse budget implications. The report recommends complex new Federal bureaucratic structures and calls for increased spending or technical assistance under six statutes. Although the Administration has supported increased aid to states in implementing Federal laws where appropriate, the Administration is concerned about the open-ended nature of these recommendations.

As you know, the Administration commented extensively on the previous draft ACIR report. We appreciate the Commission's hard work in making revisions to the draft that incorporate many of our comments. Nevertheless, we regrettably cannot support the current draft for the reasons outlined above. Please contact me if you would like to discuss this issue further.

Sincerely,

A handwritten signature in black ink, appearing to read "Marcia", with a stylized flourish at the end.

Marcia L. Hale

Assistant to the President and Director for
Intergovernmental Affairs

Attachment

cc: ACIR Commission Members

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

17-Jul-1996 06:41pm

TO: Marcia L. Hale
FROM: Jennifer L. Klein
 Domestic Policy Council
CC: Christopher C. Jennings
SUBJECT: ACIR Report

You had asked for our view on the Medicaid problems in the ACIR report. The major problem is that the report recommends that a study be commissioned to examine private rights of action. Until the study is completed, the report recommends a moratorium on new laws and reauthorization of existing laws that grant private rights of action against state and local governments. We have argued throughout the Medicaid debate that a right of action by an individual heard in federal court is an essential part of the Medicaid guarantee. Therefore, we would oppose the study and the moratorium.

Please let me know if you have any additional questions.

*Copy: Cathey
Dwyer*

File: HRC

June 11, 1996

NOTE TO MARCIA AND SALLY

FROM: Elizabeth Drye 

SUBJECT: Draft Memo to Leon on ACIR

Attached for your review is a draft ^{memo} ~~letter~~ to Leon on the ACIR report. Dan Chenok has reviewed and edited. Please suggest changes in content or format.

Marcia, please let me know how you would like to proceed. Sally, we'll continue to work with Dan while you're out (and we'll be thinking of you).

--- STAFF DRAFT ---

June 11, 1996

MEMORANDUM TO LEON PANETTA

FROM: Marcia Hale
Sally Katzen
Elizabeth Drye

SUBJECT: Advisory Commission on Intergovernmental Relations (ACIR) Draft Report

Governor Winter, ACIR's Chairman, has asked Marcia Hale to confidentially review a new draft of ACIR's unfunded mandates report. Although this draft addresses some of our previous concerns and is apparently acceptable to Governor Winter and possibly to other Democratic Commission members, we recommend that the three Administration officials on the Commission -- Marcia Hale, Secretary Riley, and Administrator Browner -- oppose the report and work to ensure other Democratic members oppose it. This memo seeks your approval of this approach.

Background

- o ACIR's Congressional Charge: The Unfunded Mandates Reform Act directs ACIR to "review the role of Federal mandates in intergovernmental relations," including establishing a framework and measurement tools for evaluating mandates and identifying specific mandates that should be addressed.
- o Previous Administration Position -- In January, the Commission voted to release a draft report for public comment. The Federal Agencies commented extensively on the draft. In addition, on March 1, 1996 Marcia Hale wrote to Governor Winter stating the Administration's strong objections to the report's analytic approach and policy conclusions (letter attached). The letter indicated the draft report:
 - o did not adequately speak to ACIR's Congressional charge to establish a broad conceptual framework for considering individual mandates;
 - o did little to further consensus on fundamental questions such as how to measure the costs and benefits of mandates;
 - o presented misleading analyses of 14 Federal health, safety, environmental, worker protection, and civil rights laws, failed to discuss their benefits, and recommended unacceptable changes to most of these laws;
 - o went beyond the scope of the Act by suggesting changes to disability civil rights statutes excluded by the Act; and

Revised Draft

- o Content -- The new draft, although less egregious in its recommendations (attached), contains the same fundamental flaws. For example, the report:
 - o still largely fails to consider benefits (the final page acknowledges ACIR did not consider the benefits of mandates on working men and women);
 - o to mitigate what ACIR characterizes as costly mandates, recommends increased Federal spending and/or technical assistance for 7 statutes (OSHA, ISTEA (drug testing provisions), CWA, IDEA, ADA, SDWA, and the CAA) and recommends new bureaucratic structures to assist states;
 - o argues (unconvincingly) that two civil rights statutes -- the ADA and the Individuals with Disabilities Education Act (IDEA) -- are within the Commission's scope and recommends unacceptable changes to ADA;
 - o proposes more moderate but still problematic changes to 5 statutes -- the Fair Labor Standards Act (FLSA), ISTEA (drug testing provisions), CWA, ADA, and Davis-Bacon related acts.
- o Status -- Governor Winter is ready to ask Commissioners to vote to approve the report. The Commission sunsets at the end of this fiscal year, is short on funds, and is eager to conclude its work.

Recommendation: Administration officials should oppose the revised draft and urge other Democratic members to oppose it.

- pros o If we oppose the report we will avoid attack by labor, environmental and disability groups and potentially by fiscal conservatives who would cite the report's call for more Federal spending.
- o The Administration already has a strong record on unfunded mandates. We've issued executive orders and taken strong actions to implement the Unfunded Mandates Reform Act. We've also proposed changes to address certain specific burdens identified in the report (e.g. reporting requirements in IDEA) and have provided enhanced technical assistance and flexibility under numerous statutes.
- cons o We could be criticized as being inflexible given improvements in this draft.
- o We could be criticized for not acting aggressively to address the burden of unfunded mandates.
- o Some Democratic Commission members, including Governor Winter, may wish to support the report, isolating Administration Democrats.

Attachments



ADVISORY COMMISSION
ON INTERGOVERNMENTAL RELATIONS

Members of the Commission

Private Citizens

Peter Lucas, Director of Legislative Affairs,
Massachusetts Bay Transportation Authority, Boston, MA
Richard P. Nathan, Director, Nelson A. Rockefeller Institute of Government, Albany, NY
William F. Winter, CHAIRMAN, Senior Partner, Watkins, Ludlam & Stennis, Jackson, MS

Members of the U.S. Senate

Bob Graham, Florida
Dirk Kempthorne, Idaho
Craig Thomas, Wyoming

Members of the U.S. House of Representatives

James P. Moran, Virginia
Donald M. Payne, New Jersey
(Vacancy)

Officers of the Executive Branch, Federal Government

Carol M. Browner, Administrator,
U.S. Environmental Protection Agency
Marcia L. Hale, Assistant to the President
and Director of Intergovernmental Affairs
Richard W. Riley, Secretary,
U.S. Department of Education

Governors

Ame H. Carlson, Minnesota
Howard Dean, Vermont
Michael O. Leavitt, Utah
Bob Miller, Nevada

Mayors

Victor H. Ashe, Knoxville, TN
Gregory Lashutka, Columbus, OH
Edward G. Rendell, Philadelphia, PA
Bruce M. Todd, Austin, TX

State Legislators

Paul Bud Burke, President, Kansas Senate
Art Hamilton, Minority Leader, Arizona House of Representatives
(Vacancy)

Elected County Officials

Randall Franke, Commissioner, Marion County, OR
Gloria Molina, Supervisor, Los Angeles County, CA
John H. Stroger, Jr., Commission President, Cook County, IL

**The Role of
FEDERAL MANDATES
in Intergovernmental Relations
(Draft: May 30, 1996)**

RECOMMENDATIONS ON INDIVIDUAL MANDATES:

1. Fair Labor Standards Act:

Retain state and local government coverage under the FLSA but amend the Act to allow state and local government compliance with either the policies of the Act or the comparable policies of the federal government under Title 5, USC.

2. Family and Medical Leave Act:

Retain state and local government coverage under the FMLA.

3. Occupational Safety and Health Act:

Make no change in OSHA language regarding state and local government compliance; but, increase DOL consultation activities with state and local governments and increase federal funding sources for state and local government training and technical assistance on OSHA requirements as well as funding for implementation of requirements.

4. Drug and Alcohol Testing of Commercial Drivers:

Amend the law (ISTEA) to permit alternative testing requirements or program certification in lieu of testing requirements for small governments. In addition, the federal government should increase technical assistance to state and local governments on transportation safety requirements including the control and monitoring of drug and alcohol abuses by drivers.

5. Metric Conversion for Plans and Specifications:

Congress and the President are commended for extending the deadline for metric conversion of plans and specifications to the year 2000.

6. Medicaid: Boren Amendment:

Repeal the language of the Boren Amendment and insert language specifying that rate determinations are the sole responsibility of each participating state and that such rates must be established to assure that health and nursing home care is provided in conformity with applicable federal and state laws and regulations related to quality of care and safety standards.

7. The Clean Water Act:

Increase federal funding for states and local government to support construction of municipal wastewater facilities and amend the Act to give EPA specific authority to extend deadlines for compliance on a case-by-case basis.

8. Individuals with Disabilities Education Act:

Increase federal funding to 40% of the excess costs of special education as is authorized by the Individuals with Disabilities Education Act and amend the Act to relieve state and local governments of prescriptive administrative and recordkeeping requirements unrelated to the education of individuals with disabilities. Also, amend the Act to foster increased use of mediation and other forms of alternative dispute resolution.

9. Americans with Disabilities Act:

Provide increased technical assistance and educational information to state and local governments, as well as increased funding for compliance with mandated ADA requirements. Amend ADA to require the federal government to coordinate enforcement and technical assistance in areas where there are cross-agency issues.

10. The Safe Drinking Water Act:

Enact amendments to the Safe Drinking Water Act similar to those approved by the Senate in S.1316 (104th Congress) including language permitting states increased flexibility for implementation of national standards.

11. Endangered Species Act:

Amend the law to give state and local governments an official role in the management and planning decisions affecting the listing process, beyond the traditional consultation and full notice and comment requirements currently in effect.

12. The Clean Air Act:

Make no change in existing federal standards but increase federal aid and technical assistance to help states comply.

13. Davis-Bacon Related Acts:

Amend the related laws to exempt projects below a higher dollar threshold than exists in most laws and consider exempting projects in which federal participation is a low percentage of total project costs.

14. Required Use of Recycles Crumb Rubber (Repealed)

Commend the Congress and the President for repealing this federal mandate.

RECOMMENDATIONS ON COMMON ISSUES:

1. Detailed Procedural Requirements:

In general, state and local governments should be permitted, through statutory language, flexibility in choosing the methods used to comply with a federal mandate. Federal agencies should assist state and local governments by providing research and technical advice on implementation approaches and methods to save the state and local governments design and adaptation costs, whenever possible. The focus of federal statutes, regulations, and policies should be on results, not process.

2. Lack of Federal Concern About and Fund of Mandate Costs:

As requires by the Unfunded Mandates Reform Act, the federal government should take federal, state, and local costs of policy implementation into consideration before enacting a law containing a federal mandate on state and local governments. In addition, the federal government should assume some share of mandate costs as an incentive to restrain the extent of the mandate and to aid in seeking the least costly alternatives. 

3. Federal Failure to Recognize State and Local Governments as Governments:

Federal laws and regulatory policies should recognize that state, local, and tribal governments are co-makers of national policy who, in contrast to interest groups and private entities, are led by elected officials who must account to the voters within their respective jurisdictions just as do the President and the Members of the US Congress.

4. Authorization of Lawsuits Against State and Local Governments to Enforce Federal Law:

The federal government should commission a study to examine the constitutional and intergovernmental issues raised by laws authorizing private rights of action against state and local governments. Such a study should be concluded prior to enactment of any more statutory language authorizing private rights of action against state or local governments and prior to any re-authorization of existing statutes with such language.

5. Inability of Very Small Local Governments to Meet Mandate Standards and Timetables:

The federal government should increase the number of laws and regulation that allow for deadline extensions or requirement modifications for very small governments that cannot meet existing time limitations or cannot afford compliance with national standards.

6. Insufficient Communication on or Ineffective Coordination of Federal Policies:

The federal government should establish a coordination mechanism to assist state and local governments through the federal policy maze. The coordination mechanism should be designed to avoid the conflicts of interest that arise in a lead agency process because a lead agency usually has program as well as coordination responsibilities. Desk officers could be assigned for each state as a single point of contact or ombudsperson for questions on federal policies and common rules could be drafted to implement mandates under the jurisdiction of multiple federal agencies. In addition, an arbitration process could be developed to make binding decisions on issues related to federal mandates that arise among federal agencies or between the federal agencies or between the federal government and state or local governments.

THE WHITE HOUSE
WASHINGTON

March 1, 1996

The Honorable William F. Winter
Chairman
U.S. Advisory Commission on
Intergovernmental Relations
800 K Street, NW
Suite 450, South Building
Washington, DC 20575

Dear Governor Winter:

I am writing to express my deep concerns about the preliminary staff draft of the Advisory Commission on Intergovernmental Relations (ACIR) Report: *The Role of Federal Mandates in Intergovernmental Relations*. The draft report fails to respond to key questions the Congress posed to ACIR, and instead focuses on policy issues well outside of ACIR Congressional mandate or area of expertise. In addition, the draft report discusses the costs of mandates largely without examining their benefits. As a member of the Commission, I oppose many of the specific recommendations in the report, and would like to work with you and other members of ACIR to develop a more balanced report of the Commission's work.

As you know, Title III of the Unfunded Mandates Reform Act of 1995 directs ACIR to: (1) "review the role of Federal mandates in intergovernmental relations and their impact on State, local, tribal, and Federal government objectives and responsibilities, and their impact on the competitive balance between State, local, and tribal governments, and the private sector and consider views of and the impact on working men and women on those same matters;" (2) investigate the role of unfunded State mandates on local governments; (3) make recommendations in seven different general areas, including providing flexibility and reconciling inconsistent mandates; and (4) identify specific mandates that should be addressed in each of these areas. Congress also instructed the ACIR to examine measurement and definitional issues involved in calculating total costs and benefits of Federal mandates.

The preliminary staff draft report does not adequately reflect this Congressional charge. Unfortunately, the draft report focuses on the requirements of specific statutes without establishing a sufficient framework for their consideration. The report does little to further consensus on fundamental questions such as how state mandates affect local governments and how we should measure the costs and benefits of mandates. Instead, it presents cursory and often misleading analyses of 14 Federal health, safety, environmental,

worker protection, and civil rights laws. These analyses fail to consider the views of or effects on working men and women as directed by Congress.

For example, the preliminary staff draft recommends that Congress repeal the Family and Medical Leave Act's (FMLA) applicability to state and local governments. The Clinton Administration opposes this recommendation. The draft report asserts that the FMLA has "created unfunded costs related to extending medical insurance coverage to employees while on leave, to temporary hiring of replacement workers, and to additional training and personnel counseling activities..." The report cites no supporting evidence for this claim, however. Further, the report does not acknowledge the substantial benefits to employers, families, and individuals of implementing FMLA requirements. In addition, the Administration strongly opposes the recommendations that would weaken other labor protections including proposed changes to OSHA, the Fair Labor Standards Act and Davis-Bacon-related acts.

The preliminary staff draft also recommends several generic modifications to Federal laws without carefully considering the consequences of such changes. For example, the draft report proposes eliminating citizens' rights to sue state and local governments to enforce Federal mandates. The Administration strongly opposes this broad-sweeping change. Again, the recommendation is based on a consideration of costs but not of benefits. The draft report simply asserts that citizen suits create "budgetary uncertainties and substantial legal costs" for state and local governments. The draft report does not document or quantify these costs, or discuss the constructive role citizen suits have played in strengthening enforcement of civil rights, environmental, and other Federal statutes.

The draft report's proposed changes to specific environmental laws are similarly disconcerting. The preliminary staff draft recommends -- again without adequate justification -- substantially weakening Federal environmental statutes. For example, the draft report recommends eliminating financial aid penalties for states that fail to meet Federal air quality standards where such states are making a good faith efforts to comply. The Administration opposes this proposal. As the draft report itself notes, most states did not adequately control air pollution until strong Federal standards and enforcement mechanisms were put in place. Now that sanctions are mandatory, states, with a few exceptions, are meeting compliance deadlines, although sanctions have almost never been applied..

Another particular concern is the report's recommendations with respect to civil rights laws for people with disabilities -- specifically, the Americans with Disabilities Act (ADA) and the Individuals with Disabilities Education Act (IDEA). The Administration opposes the draft report's recommendations with respect to these laws. Since the Unfunded Mandates Reform Act does not apply to civil rights statutes, it is inappropriate for ACIR to recommend changes to these laws. The draft report's recommendations to eliminate a private right of action and to reduce state and local governments' compliance obligations under these statutes would set back our efforts to guarantee equal rights for citizens with disabilities. I would note that both of these laws allow Federal agencies to emphasize education and voluntary compliance as much as possible, and that this Administration has taken a cooperative and flexible approach in implementing the ADA and IDEA.

I am also concerned about the process for seeking public comment on the staff draft. I urge you to ensure full public participation in the Commission's deliberations. I understand the ACIR is sponsoring a March 6-7 Conference on Federal mandates and is charging an admission fee. In my opinion, charging a fee in this context is inappropriate since it creates a barrier to full public participation. I strongly endorse an accessible public meeting to seek comment on ACIR's activities.

As you know, the Clinton Administration has worked hard to strengthen the intergovernmental partnership and to address state and local government concerns about unfunded mandates. The President signed Executive Order 12875 during his first year in office to ensure that new regulations do not place undue burdens on states and communities. In March of 1995, he signed the Unfunded Mandates Reform Act. In addition, the Administration has proposed or supported modifying a number of Federal laws to ease the public sector's compliance burden. Further, in implementing Federal laws, the Administration has sought to provide state and local governments with enhanced technical assistance and to help them take full advantage of the flexibility that already exists in many Federal statutes.

I have additional serious concerns about many of the draft report's recommendations not mentioned in this letter. Attached are comments prepared by Federal agencies and departments on the draft report. Federal agencies will also be forwarding comments to you and the Commission directly. I urge you to give their comments full consideration as the Commission redrafts the report.

Sincerely,

A handwritten signature in black ink, appearing to read "Marcia Hale", written in a cursive style.

Marcia Hale
Assistant to the President and Director for
Intergovernmental Affairs

Attachments

cc:

ACIR

ENVIRONMENTAL PROTECTION AGENCY
REGIONAL OPERATIONS/STATE/LOCAL RELATIONSDATE: May 3-1996

To:

NAME:

Kris Balderson

ORGANIZATION:

White House Cabinet Affairs

FAX NUMBER:

456 - 6704

PHONE NUMBER:

FROM:

Anna RaymondSHELLEY METZENBAUM, ASSOCIATE ADMINISTRATOR
OFFICE OF REGIONAL OPERATIONS & STATE/LOCAL RELATIONS

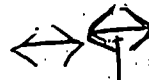
PHONE: (202) 260-4719

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TIME:

6:15 pm

TOTAL NUMBER OF PAGES:

18 

SUBJECT:

ACIR - Sections

MESSAGE:

Here are our three sections① Safe Drinking Water (6 pages)② Clean Water (5 pages)③ Clean Air (6 pages)They are all numbered individually in the bottom left corner

The Safe Drinking Water Act

Overview

The *Safe Drinking Water Act* (SDWA) regulates drinking water for the roughly 58,000 community water systems (as well as providing lesser requirements for the additional 140,000 non-community water systems such as restaurants, campgrounds, churches, schools and factories) serving 25 or more persons on a regular basis. Approximately 37,000 of these systems serve less than 500 customers. The nearly 16,000 systems that are privately-owned range from trailer parks and homeowner associations, whose primary business is other than providing drinking water, to investor-owned water systems closely regulated by state utility commissions. 82 percent of systems in urban areas are publicly-owned.

SDWA was originally enacted in 1974 and amended in 1986. It directs the U.S. Environmental Protection Agency (EPA) to establish maximum levels for chemical, radiological and microbiological contaminants in public water systems, water testing and (for a few contaminants) specific treatment requirements, procedures for states to become primary implementation authorities for the Act and provides for enforcement and public notification. It sets a wide range of responsibilities for states and drinking water suppliers.

Why the Mandate was Adopted

Prior to 1974, states were responsible for ensuring drinking water safety, generally relying on voluntary standards set by the PHS. Congress adopted the SDWA in 1974 in response to a number of serious concerns that had been documented over the previous several years in studies of the U.S. Public Health Service (PHS).

A key PHS study cited in the congressional Committee reports found that only 10-15% of water systems conducted adequate testing for basic microbiological safety; that one-third of systems that tested found contamination exceeding the PHS limits; and that 56% of systems had physical deficiencies that could seriously affect safety. Small systems' lack of economies of scale was repeatedly noted as a major source of water safety vulnerability. An earlier PHS had noted that many of its drinking water standards were based on insufficient data, did not cover many known contaminants, and that new contaminants -- particularly organic chemicals with potentially carcinogenic effects -- were occurring in drinking water and could require regulation.

Thus, Congress decided in passing SDWA in 1974 that the lack of national requirements meant that the status quo was entirely inadequate to assure safe drinking water to the American people. Unsafe drinking water endangers both the residents of a local community and state and interstate travelers and interstate commerce, and is at odds with the American people's fair expectation that tap water anywhere in American should be safe to drink. Thus, there is an enduring national interest in ensuring safe drinking water.

A second area of concern is standard-setting: how contaminants are selected for regulation, and how they are regulated once selected. Current law requires EPA to select and regulate 25 new contaminants every 3 years, regardless of whether or not so many contaminants actually present a health risk that warrants regulating, and regardless of whether scientific data or EPA resources clearly support all such regulations. Instead of the current law's mandatory duty to regulate, EPA should have a mandatory duty simply, on a regular basis, to examine the health effects and occurrence of a minimum number of contaminants, decide whether or not those contaminants warrant regulation based on that scientific examination, and regulate only those that do.

In addition, the current law's focus on affordable and available treatment technologies in setting standards does not allow flexibility to ensure that potentially-costly future regulations are also "worth it" in the degree of risk reduction they provide. So far, the relationship of health risk reduction benefits to treatment costs appears to have been fairly reasonable. For the risk reduction benefits of SDWA described above, a recent Congressional Budget Office (CBO)

SDWA

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report found that "available data do not indicate that {SDWA} has imposed high costs on most households[,] ... [the] Act currently places a small fiscal burden on most municipalities," and that "\$1.4 billion to \$2.3 billion per year should be viewed as a range of estimates of the total cost that water systems will bear to comply with SDWA regulations that went beyond pre-SDWA standards."

However, CBO reported that costs per cancer case avoided for different contaminants currently regulated, averaged for all water systems, varied between \$0.5 million to \$4.3 billion. While these are largely theoretical costs, no treatment costs actually incurred by water systems (CBO states that "the high cost per cancer case avoided [is] ... the result of the extremely small number of cases avoided" rather than reflecting water system's actual treatment costs), the CBO analysis does illustrate the potential value of assessing and determining whether the benefits of a potential regulation are worth the costs. After all, drinking water standards are promulgated with the expectation that some systems whose source water does not meet the standard will in fact have to build such treatment. Thus, they should be formulated to be not only practical to implement but reasonable.

A third area of concern has been the lack of federal financial assistance for compliance given the cost burden imposed by SDWA mandates, particularly for small systems. While over \$16 billion in grants and loans have been provided for rural water supply infrastructure through the Department of Agriculture, SDWA contains no authority for financial assistance to systems to aid with these compliance costs.

Innovations to Reduce the Mandate Burden: Progress to Date

In addition to the issues described above, some have raised other areas of concern for which appropriate, consensus remedies have already been identified in the congressional discussions over SDWA reauthorization, or in the EPA Safe Drinking Water program Redirection initiative. This initiative was undertaken beginning in October 1994 to explore ways in which the authority of the existing SDWA could allow the EPA to set more risk-based, cost-effective, flexible priorities for the drinking water program.

MCLs as Performance Standards: For example, one concern voiced is to revise SDWA so that compliance with maximum contaminant levels is based on performance not process. In fact, this is already the case. Systems whose finished water (that is, water within their distribution lines) violates an MCL need simply use whatever technology or other means their state will accept to bring their finished water quality into compliance with the MCL (the standard). Neither SDWA nor EPA's regulations require a system to use any specified technology to meet a MCL.

There have been two problems with MCL compliance in practice. One is that, for some contaminants, there is no technology or other means that many smaller water systems can afford that will treat their water to comply with the MCL. This problem is well-known, well understood,

SDWA

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and appropriately addressed by providing new affordability variances, as in all three SDWA bills passed by either House of Congress to date.

The second problem is much less known. EPA must (under SDWA) set the MCL by reference to affordable, available technology that comes as close as feasible to the level at which there is "no adverse health effect." While the MCL that results is a numerical performance standard, many states have been unwilling to allow systems to use a different technology (or packaged rather than custom-engineered technology) than the technology that is the reference point for the MCL. This does not arise from a lack of state flexibility in implementing the law but results from an understandable state reluctance to approve technologies that may lack an extensive track record guaranteeing that systems using them would come into compliance with the MCL. The remedy is the provision in all relevant SDWA bills requiring EPA to list a range of technologies enabling states to presume that a system's use of such technologies will allow it to meet the MCL.

The Good Science Basis for Surface Water Filtration: Some of the more emphatic concerns voiced about SDWA relate to the Surface Water Treatment Rule (SWTR), which requires filtration for all surface waters whose sources are not clean and demonstrably free of the indirect indicators of microbial contamination, and of conditions that would tend to produce such contamination. The concerns are that the costs of filtration in such cases may be substantial and risks may seem relatively low because there may not always be direct evidence of specific existing and measurable contamination. While these concerns may seem troubling, the SWTR is based in sound science and well-established knowledge and practice in public health and sanitary engineering.

The SDWA allows EPA to prescribe a mandatory treatment technique, such as filtration, rather than a performance standard MCL, where it would be "technically or economically infeasible to measure the level of a contaminant." This is the case with microbial contaminants (such as giardia or crypto sporidium), which can be dangerous in any concentration and which (unlike most chemical or radiological contaminants) do not tend to dilute relatively evenly in surface water supplies. A system might sample uneconomically large quantities of water, find no waterborne diseases, and still not be able scientifically to be confident that diseases which would pose a serious threat to public health were not present. Thus, because of the nature and unpredictable occurrence of microbial contamination, the fact that samples may be free of direct contamination does not mean, scientifically, that the water is reasonably safe from that contamination where other, related conditions that show safety are not also present.

This is a widely accepted policy in the states and the drinking water and public health professions. Thirty states required filtration for all surface water systems even before the SWTR was promulgated. The American Water Works Association, the water industry's professional organization, has had a policy for three decades that water systems should filter all surface water supplies, without any exception -- even when source waters are well protected. The states and EPA have granted such exceptions to over 140 systems nationally. The late Abel Wolman, a pioneering sanitary engineer and for over six decades the dean of American water supply

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professionals, long urged surface water systems to use multiple barriers, in which they both protected source waters and filtered. Thus, EPA's allowance of filtration avoidance for source water protection is more lenient than the widely held view among sanitary engineers.

Nonetheless, some small water systems that lack economies of scale may well have difficulty affording filtration of surface water supplies. (It should be noted, however, that some of the claims of high filtration costs often inappropriately include high and unrelated costs of replacing worn out supply infrastructure.) Because surface water filtration is such a basic, essential health protection measure, EPA has advocated, and all three SDWA bills that passed the House or Senate have included, authorization of a State Revolving Loan Fund to help underwrite the cost of filtration, and provisions to authorize less costly, package filtration plants for small systems that states will accept in all cases, without custom engineering.

The challenge to which these measures respond is to find creative ways to afford the necessary level of protection consistent with the SWTR, not to provide less protection in this vital area. Indeed, protection of drinking water against microbial contamination is the most basic public health provision a water system can give its customers.

Water System Monitoring Requirements: While concerns have also been voiced that systems are forced unproductively to spend money on testing, which costs "do not improve water quality," this is true only in a literal sense. Tests of water quality do not literally "improve water quality" but simply tell what that quality is. But if systems do not adequately test the quality of their water, on what scientific basis can customers, state regulators, or the systems themselves be sufficiently confident that water quality is safe? The burgeoning sales of bottled water, which a 1993 survey for the American Water Works Association identified as being about half motivated by concerns for drinking water safety, make complacency about consumer confidence and testing mistaken. Clearly, the appropriate issue for discussion in response to concerns about testing costs is, what constitutes "adequate" testing?

EPA has added testing waiver programs that states can adopt and which can cut testing costs by more than two-thirds. These waivers are given in situations where an anthropogenic (man-made) contaminant was never used in an area, or where hydrogeologic data shows that a system's water source is not vulnerable to contamination. Nearly all states have EPA-approved programs in place, and EPA has frequently given expedited, interim approval to allow many of these states to give systems waivers prior to full approval, specifically to address the cost concern.

However, EPA has recently recognized that even these waiver programs have their limitations. They are more resource-intensive to start than some states can afford without more federal aid, and gradual state implementation has not enabled all eligible systems to get the benefits of such waivers. Thus, as a part of its drinking water program redirection initiative, EPA has been framing and considering alternatives to reduce testing requirements for chemical contaminants (the source of greatest small system cost) to focus on those systems at risk of contamination, and on sampling to be done at the time of the water system's maximum vulnerability.

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This approach can be flexible, cost-effective, responsible public health policy if tests are timed and located by good information to be properly indicative. Good information and good science are the foundation of responsible public policy.

RECOMMENDATION: *Congress should enact amendments to address the high per capita costs of small systems, to allow EPA to examine health effects and occurrences of specific contaminants, to determine priorities for standard-setting, provide more implementation authority for states, and to provide financial assistance to water systems and states to ensure fuller protection of public health and prevent contamination of drinking water.*

THE CLEAN WATER ACT

Overview

The Clean Water Act (CWA) is the primary Federal legislation that protects the Nation's surface waters, such as lakes, rivers, and coastal areas. The goal of the Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.

The CWA provides a comprehensive framework of standards, technical tools, and financial assistance to address the many sources of pollution that can adversely affect water quality, including municipal and industrial wastewater discharges, polluted runoff from urban and rural areas, and habitat destruction.

The CWA requires national minimum standards for major industries, such as iron and steel manufacturing and petroleum refining, that provide a single, minimum level of pollution control for all dischargers in a industry based on the best treatment technologies available.

In addition, States survey their waters, determine an appropriate use, such as recreation or water supply, and then set specific water quality criteria for various pollutants, as needed to protect those uses. These criteria, together with the national industry standards, are the basis for permits that limit the amount of pollution that can be discharged to a water body. Under the National Pollutant Discharge Elimination System, sewage treatment plants and industries that discharge wastewater are required to obtain permits and to meet the specified limits in those permits.

The CWA also provides Federal funding to help States and communities address their clean water needs. Funding is also provided to the States to address another major water quality problem -- polluted runoff from urban and rural areas.

Protecting valuable aquatic habitat, such as wetlands, is another important component of this law. Filling wetlands with dredged or fill material can destroy or degrade these important aquatic areas and have a profound impact on water quality. To minimize impacts, the CWA requires permits to ensure that these types of activities are conducted in an environmentally sound manner.

Why the Mandate was Adopted

Twenty years ago, the quality of America's rivers, lakes, and coastal waters was declining rapidly. Lake Erie was dying. Many rivers were little more than open sewers and sewage commonly washed up on beaches. Fish kills were a common sight. Wetlands were disappearing at a rapid rate. Threatened by industrial pollution and inadequate sewage treatment, our rivers, lakes and harbors were overwhelmed by the uncontrolled waste of a growing Nation.

In the 1960's, water pollution controls were implemented as needed to attain limited water quality standards adopted by each State. States were to decide the uses of water to be protected, degrees of pollution abatement to be required, and the time to be allowed a polluter for abatement. This approach to water pollution control was of limited success. Many States did not adopt needed standards. The appropriate type or degree of effluent treatment was often disputed. Schedules for pollution control slipped because of the failure to take enforcement action.

Prior to 1972, many communities dumped untreated or under treated sewage directly into lakes, rivers and oceans. Water quality standards did little to foster commitment to increased sewage treatment. Progress toward improvement of sewage treatment facilities was hindered by lack of a single national treatment standard and the lack of Federal funds to assist communities with the costs of construction.

In 1972, the Congress responded to widespread public concern for serious water pollution problems and enacted a comprehensive national program to protect the quality of the Nation's waters (termed the "Clean Water Act"). The CWA supplemented the existing State water quality standards with national minimum treatment standards for industry and for sewage treatment plants. A national discharge permit program was established to assure that controls were implemented. The level of funding for Federal grants to communities to support sewage treatment plant construction was dramatically increased. And, new authority was adopted for protection of wetlands.

Today, the American people recognize the CWA as one of the most successful environmental statutes. In an August 1995 Harris poll, 72% of Americans indicated that laws and regulations to control water pollution were "not strict enough" while only 45 said the laws and regulations are "too strict."

Benefits and Concerns

The quality of the Nation's waters has improved dramatically as a result of a cooperative effort by local, State, and Federal governments to implement the water pollution control programs established in the CWA.

The dramatic improvements in sewage treatment over the past twenty years are a national success story. Local, State and Federal governments have invested over \$80 billion in sewage treatment facilities under the CWA. These facilities now remove millions of tons of pollutants from municipal wastewaters annually and have made routine discharge of raw sewage increasingly rare. Much of this progress was accomplished by the implementation of a single, national, minimum standard for sewage treatment (termed "secondary treatment").

Over fifty major categories of industry comply with national "effluent guidelines" establishing minimum standards for effluent discharges. These guidelines, and related requirements concerning industrial discharges to sewage treatment systems, result in the removal of over one billion pounds of toxic pollutants from industrial wastewaters each year.

Despite this progress, serious water pollution problems remain. Almost 40% of the waters assessed by the States have not attained desired water quality. Water pollution still causes beach closings, makes some fish unsafe to eat, and prevents attainment of water quality goals.

In addition, there are growing concerns that clean water programs have not been adapted to meet changing conditions. Local governments are concerned that Federal funding for sewage treatment construction (now provided in the form of low interest loans rather than grants) does not provide the same financial benefit that it did in past years and that requirements to address pollution other than sewage, such as stormwater, pose a financial burden.

States are concerned that, as some of the largest industrial and sewage discharges have been controlled, pollution control program requirements should be more flexible. States, local government, and private citizens have expressed concern with requirements related to permits for activities in wetlands.

Innovations to Reduce the Mandate Burden: Progress to Date

In addressing the remaining water quality problems, the Federal government must work with State and local governments to reinvent the original, successful Federal, State and local partnership for clean-up of the Nation's waters. The two key elements of this new partnership must be --

- a renewed commitment to Federal funding to support financing of municipal water pollution control projects; and
- a significant increase in flexibility in the implementation of pollution control programs related to municipalities and other dischargers.

A) Assure Adequate Funding

As a first step in creating a new partnership for water pollution control, the Federal government must continue to support financing of municipal water pollution control projects.

At a minimum, at least \$2 billion should be made available each year within the states revolving loan fund for low interest loans to finance municipal water pollution control facilities. States must continue to have flexibility in allocating funds to the most important and needy projects in the State.

In addition, States must be given greater flexibility to assure that financing of local water pollution control projects is consistent with the fiscal constraints faced by local governments, especially small communities. Congress must provide States with clear authority to extend loan repayment periods and to forgive a part of loan as needed to assure that projects meet affordability guidelines.

B) Increase Flexibility and Efficiency

The Federal government must work with State and local governments to design significantly increased flexibility for implementing low cost, realistic water pollution controls.

A key step in this effort is for the Environmental Protection Agency to continue working with the Stormwater Federal Advisory Committee, including State and local governments, to assure that measures for control of municipal stormwater discharges are developed using the full flexibility available under the current law.

In addition, in addressing overflows from combined storm and sanitary

sewers, the EPA must adhere to the consensus policy for control of these discharges developed by State and local governments and other organizations. This policy provides a common-sense, realistic approach to effective control of water pollution problems caused by these discharges and assures that local governments are able to implement controls on reasonable timetables that are respectful of fiscal constraints.

The Federal government must work constructively with State and local governments to develop innovative, low cost approaches to water pollution control. For example, the Environmental Protection must encourage States to address water pollution problems on a watershed basis and must provide clear guidance and authority for the use of innovative and cost-saving methods of pollution control such as "trading" of pollution controls among pollution sources in a watershed.

Finally, the Federal government should dramatically improve the effectiveness permit programs.

EPA must reduce the reporting burdens of facilities with Federal permits to discharge to waters. This effort should include streamlining regulations, reducing effluent monitoring, and streamlining permit applications. These steps would increase flexibility and improve efficiency for both municipal and industrial dischargers.

EPA should also work to improve and permit programs for activities in wetlands. Key concepts in this area include providing new authority for "mitigation banking" to accomplish wetlands protection goals more effectively, reduced regulatory burden through better use of general permits, and improved processes for identification of wetlands.

RECOMMENDATION: Reinvent the successful Federal, State and local partnership for clean-up of the Nation's waters by renewing the Federal commitment to financing of water pollution control projects through flexible loan programs and assuring that State and local governments participate in the design of significantly increased flexibility for implementing low cost, realistic water pollution controls.

The Clean Air Act

OVERVIEW

The Clean Air Act establishes a framework for the attainment and maintenance of air quality standards at a level to protect public health and the environment. It sets emission standards for motor vehicles and fuels, regulates hazardous air pollutants, protects stratospheric ozone, and takes steps to limit acid rain. The original Clean Air Act, signed into law by President Lyndon B. Johnson in 1963, was considered to be the first modern environmental law enacted by the United States Congress. The Clean Air Act of 1970, reviewed and amended in 1977 and 1990, forms the basis of the nation's air pollution control program today. National level requirements were established so that no facility would be assured of a competitive advantage by having to meet less stringent controls.

Health-based national ambient air quality standards are the center-piece of the Clean Air Act. The standards are to be met through the application of control technologies that effectively reduce emissions and thereby produce improved air quality.

WHY THE MANDATE WAS ADOPTED

Federal and state clean air legislation has existed since the 1960's, enacted in part at the request of the nation's cities who sought federal action to deal with air quality problems. The first state clean air law was enacted in 1952. Prior to that time, efforts to control air pollution were primarily the purview of the cities. The first national air pollution legislation was enacted in 1955 to address killer smogs in Donora, Pennsylvania, and New York City. Federal funds were provided for research, training, demonstration projects and grants-in-aid to local governments. Cities, experiencing difficulties enforcing local air pollution laws, supported national air pollution standards because local polluting industries threatened to move to other, less regulated areas. The Clean Air Act of 1963, prompted by a continued decline in the nation's air quality, changed the pattern of federal-state-local relations by authorizing national air quality criteria and permitting federal intervention if a state could not successfully address its air quality problems. For the first time, federal grants were provided to states. With the passage of the Air Quality Act of 1967, states were required to develop, set and implement plans to achieve national air quality standards. Increased federal funding was also provided. By 1970, however, only 21 states had submitted implementation plans, and Congress decided it was necessary to set standards and enforce state implementation.

The framework for the nation's current clean air effort was developed under the 1970 and 1977 versions of the Clean Air Act. The 1977 Amendments added provisions to preserve the air quality in relatively pristine areas. They also deferred some of the strict requirements established in the 1970 legislation, which had proved to be unachievable within the time originally allowed.

Although great progress toward cleaner air was made under the 1970 and 1977 versions of the Act, the 1990 Amendments were enacted because twenty years of effort and commitment had not yet assured Americans the health and environmental protection they sought. In 1990, almost 140

million people still lived in communities that violated the health standard for smog. More than 40 million people still lived in communities that violated the health standard for carbon monoxide. The Toxics Release Inventory, covering only a portion of industry, reported nearly three billion pounds of toxic emissions being released into the air. More than 22 million tons of sulfur dioxide releases each year were continuing to threaten public health and add to the acidification of lakes and streams.

The 1990 Amendments were enacted in response to broad public concern that America had not yet achieved the benefits of clean air. After 20 years of national deadlines, state plans, and "good faith" efforts, the Clean Air Act had not been able to achieve the established goals. In 1990, Congress added more detailed and specific requirements to the Act. Congress was clear that its reason for adding the specific requirements was years of public frustration with the lack of progress in cleaning up the air on the part of both the federal Environmental Protection Agency and the state and local governments. As a result, Congress added requirements for EPA to establish new programs, such as acid rain control and operating permits, and to issue new regulations for a wide variety of industries (e.g., automobiles, steel, chemicals, oil, utilities).

The 1990 Amendments also included specific pollution reduction targets requiring state and local governments to reduce the pollution that causes ground-level ozone (or smog) by 15 percent over six years and then 3 percent per year thereafter. In addition, the 1990 Amendments included specific requirements for states and local governments, such as vehicle inspection and maintenance programs, to help improve air pollution. These requirements generally vary according to the severity of the air pollution problem in question. In exchange for more specific requirements, Congress provided states and local areas with longer deadlines to meet the standards -- as long as 15 to 20 years for those areas with the worst problems. By and large, the Clean Air Act gives state and local governments flexibility to determine how best to achieve those reduction goals.

In 1990, mandatory sanctions provisions were also added to the law. Though previous Clean Air Acts contained discretionary sanction provisions, those provisions lacked the predictability and objectivity of the provisions which were added to the law in 1990. Today, it seems clear that the sanctions provisions are working. With only a handful of exceptions, areas are not being sanctioned because -- for the first time -- they are meeting deadlines and air quality is steadily improving in all parts of the country.

Federal grant money to the states to implement the Clean Air Act has grown steadily over time, from \$49.5 million in 1975 to \$96.2 million in 1988 to \$181 million in 1995.

BENEFITS AND CONCERNS ABOUT THE CLEAN AIR ACT AND THE 1990 AMENDMENTS

The Clean Air Act has dramatically reduced air pollutant emissions from industries and motor vehicles. The benefits include large reductions in respiratory and heart problems, dramatically

reduced cancer and mortality rates, impressive cuts in crop and forest damage, and greatly improved visibility. Lead emissions have dropped 98% since 1970 because of flexible, phased reduction of lead in gasoline and industrial controls. The Clean Air Act has also substantially cut emissions of particulate matter (78%), sulfur oxides (30%), carbon monoxide (25%) and smog-forming volatile organic compounds (24%). Meanwhile the domestic economy grew by 71 percent and the U.S. population by 25 percent. By 1990 overall air pollution was cut by 146 million tons per year, over half a ton for every man, woman and child in America.

Following passage of the 1990 Amendments, more than half of the smog and carbon monoxide areas in the country are now meeting the national health-based standards, and they are doing so on time. Moreover, more than two billion pounds of toxic emissions and millions of tons of sulfur dioxide emissions are being removed from the air each year. These numbers represent tens of millions of people breathing cleaner air across the country. Almost without exception, every area of the country is seeing reduced pollution levels, which means that threats to public health are being reduced, even if all areas do not yet meet the air quality standards.

In addition to the substantial health benefits of the Clean Air Act, air pollution control is improving visibility, protecting aquatic and forest ecosystems, reducing crop damage and reducing damage to materials (e.g., electrical components, paints, statues and monuments).

Specific benefits resulting from implementation of the 1990 Amendments include:

An unprecedented number of cities have reached the milestone of meeting health-based standards set in the CAA. Of the 98 areas of the country that were designated as non-attainment for ground-level ozone in 1990, 55 of those areas now have "clean" air and 22 have formally been redesignated to attainment. The reductions mean 140 million people live in areas that have reached attainment and therefore will experience reduced mortality, reduced airway resistance in asthmatics, and reduced respiratory illness.

Tailpipe standards for cars being built today are 25 to 60 percent more stringent than standards for new cars built in 1990. These standards continue a tremendous pattern of progress since the early 1970's, with the result that automobiles today are 90% cleaner than they were twenty years ago. These significant reductions have been integral to the efforts to reduce smog-forming pollutants across the country.

Diesel-powered urban transit buses built today emit almost 90 percent less particulate emissions than buses in 1990. These emission reductions ensure a decrease in premature deaths, improved lung function and reduced respiratory disease.

This progress can be attributed to a combination of influences: strong health-based standards; a working partnership between federal, state and local governments to achieve those standards; an ongoing commitment on the part of many sources to the development of innovative strategies for the reduction of air pollution; and, a strong, continuing public desire for clean air.

Yet, even with the success to date under the Clean Air Act Amendments of 1990, in our best years more than fifty million Americans - one in five - still remain exposed to unhealthy levels of air pollution. In the worst years that number may be one in three.

Many of these Americans are terribly sensitive to the effects of air pollution -- because they are children, because they are old, or because of respiratory or heart disease. Millions of acres of forests, croplands, and watersheds are still harmed by acid rain; communities suffer multiple exposures from toxic releases; and increased radiation from the thinning stratospheric ozone layer continues to cause an increase in skin cancers and cataracts.

For all those reasons, the focus of the 1990 Amendments has not just been to sustain the historic progress, but instead to keep finally the underlying promise of the Clean Air Act: clean, healthy air for all Americans. Given the overall success of the 1990 program -- especially in contrast to the previous twenty years -- a constructive approach to addressing state's concerns is to continue the recent efforts to redefine our partnerships and identify flexible ways to ensure continued progress toward clean air for all Americans under the framework of the 1990 Clean Air Act Amendments.

The greatest challenge in implementing the Clean Air Act has been to find the right balance between enforceable federal standards and the need for flexibility to adapt and innovate locally. State and local governments recognized and supported the need for more stringent standards and enforcement tools during the debate over the 1990 Amendments to the Clean Air Act. At the same time, the Clean Air Act assumes states will develop a fairly high level of sophistication to manage air quality programs, including developing the capacity to review complex operating permit applications from major sources, and developing and using computer models to predict future air impacts. In addition, the need to make the trade-offs required in preparing State Implementation Plans and the need to establish vehicle inspection and maintenance as required by the 1990 Amendments have forced state executive and legislative leaders to make politically unpopular decisions. This has created tremendous tension in the implementation of the Clean Air Act, tension sometimes exacerbated by decisions EPA has made or, in some cases, decisions EPA had delayed making because of its own constrained resources for implementing the 1990 Amendments.

INNOVATIONS TO ADDRESS PROBLEMS ASSOCIATED WITH MANDATES

To reduce this tension and smooth the implementation of the Clean Air Act, EPA has worked diligently with the states over the past eighteen months to identify specific problems arising in the implementation of the Clean Air Act, and to resolve them. The States have responded by working with EPA in identifying issues of specific concern. For example, in January 1995 the National Governors Association and the Environmental Council of States identified 64 specific issues where the states were looking for additional flexibility. EPA has effectively addressed the vast majority of these issues. The States have publicly supported this activity and hope to continue working with EPA in this fashion in the future.

Some examples of the extensive flexibility provided to the states in the implementation of Clean Air Act-mandated requirements as a result of this ongoing consultation include:

New rules and/or policies to provide flexibility for what constitutes an "enhanced" vehicle inspection and maintenance program;

Alternative methods for states to demonstrate attainment with the ozone standard;

Extended attainment dates for areas affected by overwhelming transport of pollution from upwind areas;

A proposed rule that would have States merge their construction and operating permit processes and to automatically incorporate into their permit the State's construction requirements. This eliminates the additional delay and administrative burden of separate permit processes;

A proposed rule waiving for five years EPA's ability to object to most permit revisions, and allowing States to exempt insignificant permit revisions from any EPA or public review.

Current joint state and federal efforts should prevent sanctions from being imposed in most states, and the record supports this belief. Of the roughly 2000 individual state implementation plan elements finally due by mid-1995, only two elements were not completed on time. Of the almost 400 sanctions "clocks" that were, by law, started during this process, only one set of sanctions is currently in place. Two other sanctions are in place for continuing violations of the health-based limits on lead pollution. In contrast to the pre-1990 cycle of failure which characterized earlier Clean Air Act deadlines, the efforts of states reflected by the completeness of state implementation plans represent a clear success story.

In addition to the work with the NGA, EPA has also focused on collaborative efforts to address specific and difficult air control problems and issues. Some of those efforts include:

Ozone Transport Assessment Group- Thirty-seven states represented by state and local air control officials and EPA officials, with input from industry and environmental groups, are working together to recommend specific ozone control measures needed based on an agreed upon modeling and assessment process. This effort was established after states and regional organizations concluded that ozone nonattainment areas cannot demonstrate attainment simply through the implementation of control measures within a nonattainment area; significant ozone and ozone precursors reductions outside the boundary of the nonattainment area were needed in order to demonstrate modeled attainment.

Grand Canyon Visibility -The Grand Canyon Visibility Transport Commission was created by the CAA of 1990 to determine what, if any, steps are needed to preserve clear days and improve visibility in 16 National Parks and wilderness areas located on the Colorado Plateau. The Commission is composed of eight Governors or their designees, five tribal representatives, and

- FLSA — Subject to DOL oversight
- policies equal to or more generous than DOL regulations
 - but OPM granted independent reg/enforcement authority
 - Consistent with FLSA (not = to or > than)
 - ^{can} Limit overtime compensation rates for higher pay grades and limit maximum earnings per pay period
- DOL argues ^{much of} litigation ^{could} be avoided w/ technical assistance, a "Opinion letter" process provides good faith defense in court.

- Davis-Bacon Related Acts — 60 Fed laws make compliance w/ Davis-Bacon Act a condition of Fed aid --
- exempt projects below higher dollar threshold than exists in most laws (\$100,000 > \$2000)
 - Consider exempting projects in which Federal participation is a low percentage of total project costs

OSTIA — language change — "lack of credible information on the rationale for or the scientific basis of" OSTIA rules... (p. 12)

five federal agencies. The Commission established a Public Advisory Committee (PAC) to obtain broad input as it formulated strategies for protecting visibility. The PAC has developed a set of emission management recommendations for the Commission and is holding public hearings to discuss these. The Commission will formally consider the PAC report in June 1996. If the recommendations are approved, they will be forwarded to EPA for action.

Cooperative Agenda Setting - EPA is consulting with its state partners on identifying priorities and appropriate implementation strategies to meet the Clean Air Act goals. State, local and tribal officials will be involved in a comprehensive planning effort. This effort will include goal setting, strategy identification, role definition, and discussion of resource allocations.

The commitment to building partnerships in meeting the challenge of clean air for all Americans is central to the success of the nation's air quality program.

RECOMMENDATIONS

Congress should continue to support federal funding and technical assistance to ensure that the EPA and States can meet the promise of the Clean Air Act Amendments of 1990.

Funding to states has increased over time, but continued strong funding is needed to keep up with the requirements of the Act. It is also important that EPA receive necessary funding to be able to provide the states with the technical support they need (for emission factors, inventories, modeling, monitoring, control technologies, information transfer, training, etc.) and to help provide for regional and national solutions, where warranted.

EPA's recent emphasis on partnerships and programs that provide states with performance goals and with federal technical assistance to help states develop regional solutions should be continued. The history of the Clean Air Act has shown that providing general goals to states and to EPA has not been successful (e.g., after 20 years of continually extended deadlines, 98 areas of the country still failed to meet the national ozone standard in 1990). However, at the same time, specific federal mandates do not necessarily make sense in every part of the country. A reasonable balance is needed. EPA's recent efforts to provide flexibility in developing attainment plans and work with states to address the regional nature of the air pollution problem in the eastern areas is a good example of how the Clean Air Act should be implemented.

1) Kick out Civil Rights; FISA; Davis Bacon; CWA / DMS testing

2) Intro - we didn't do what we are supposed to

3) Citizen suits - get rid of second sentence

4) Add'l funds - Admin won't be able to stop approval of the report

• Private annuities -

• Private right of action -

• no benefits

• delay in legislation

• drinking water -

• Desk officers assigned to each state as a single pt of contact for each state / ombudsman (NOT lead agencies - conflict of interest)

• CWA

→ • FLSA - state and local govt's have own substantial state and local suits for overtime pay / where states have own, incurred substantial minimum costs

• Transportation Employee Testing Act

• ADA

⇒ • Davis-Bacon

- Dissenting views -

- wholly inadequate as a balanced set of views -

- private rights of action

- & without discussion effect of balanced budget

- O.S. CWA -

1) Vote against include dissenting views

2) provide list of specific changes and offer to support if changes are made

oppose - file -

(1) Dissenting views

(2) after fixes - no guarantees

(3) after fixes - w/ guarantees

(1)

(2) Try to fix it but dissent from any remaining problems -

6-22-88

- Vote against
- Back from France -
- Winter voyage

Card

Bill Davis
Phil Bealborne

- will vote against
- seek others to vote against

- move from CWA
- get Sally to
- Maria Tully in
- almost

- will get distributed

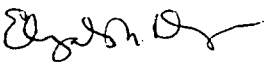
- Shorter and longer term -
- accounting of accomplishments
- 30 day reaction time

- POTUS - some time next week

No 1

July 17, 1996

MEMORANDUM TO: Marcia Hale
 Carol Rasco
 Sally Katzen

FROM: Elizabeth Drye 

SUBJECT: Memo to POTUS on ACIR

Attached for your review is a draft memo to the President on the pending ACIR vote. I've written it as an FYI memo, but it can easily be turned into a decision memo, depending on your preference. Dan Chenok has reviewed and, as always, given me very helpful comments. I can quickly incorporate any changes.

— Draft —

July 18, 1996

MEMORANDUM TO THE PRESIDENT

FROM: Marcia Hale
Carol Rasco
Sally Katzen

SUBJECT: Pending Vote on the Advisory Commission on Intergovernmental Relations'
(ACIR's) Unfunded Mandates Report

The Advisory Commission on Intergovernmental Relations (ACIR) Chaired by Governor Winter, will vote on a final report on unfunded mandates Tuesday, July 23, 1996. The Administration commented extensively and critically on previous drafts of the report. Although this draft addresses some of our previous concerns, the three Administration officials on the Commission -- Marcia Hale, Secretary Riley, and Administrator Browner -- will oppose the report and are urging other members to oppose it. The decision to oppose the report was difficult; the vote is likely to be close and partisan. For your information, this memo summarizes the basis for our opposition to the final report

Background

The Unfunded Mandates Reform Act directed ACIR to "review the role of Federal mandates in intergovernmental relations," including establishing a framework and measurement tools for evaluating mandates and identifying specific mandates that should be addressed. ACIR circulated a draft report last spring. On March 1, 1996, Marcia Hale wrote to Governor Winter stating the Administration's strong objections to the report. The draft report did little to further consensus on fundamental questions such as how to measure the costs and benefits of mandates; presented one-sided, misleading analyses of 14 Federal health, safety, environmental, worker protection, and civil rights laws and recommended unacceptable changes to most of these laws; and failed in its analyses to consider the views of or effects on working men and women as directed by Congress.

[Pending Vote]

The new report still fails to respond to the broad questions the Congress posed to ACIR about unfunded mandates. It remains a one-sided report that in places inaccurately characterizes requirements of current statutes and our approach to implementing them. The final draft recommends more moderate but still unacceptable statutory changes to provide relief to state and local governments while failing to adequately consider the effect of those changes on citizens and the environment. For example, the report proposes to:

- o Amend the Fair Labor Standards Act to allow state policies to be consistent with either with current law or with comparable policies that currently apply to the Federal

government only (labor groups oppose);

- o Amend the Clean Water Act to allow EPA to extend compliance deadlines on a case-by-case basis (environmental groups oppose);
- o Amend the Individuals with Disabilities Education Act and significantly increase Federal funding (disability and civil rights groups oppose this recommendation; we have argued that civil rights statutes are exempt from consideration by ACIR);
- o Amend Davis Bacon-related laws (requiring prevailing wages be paid to employees under certain federally-funded contracts) to consider exempting projects in which federal participation is a lower percentage of total project costs (labor opposes).

The report also:

- o recommends a study of laws that provide private rights of action against state and local governments be concluded prior to reauthorizing any existing statutes (e.g. environmental laws) with such provisions or enacting new statutes with such language (labor, environmental, and civil rights groups oppose); and
- o to mitigate what ACIR characterizes as costly mandates, recommends increased Federal spending and/or technical assistance for 6 statutes and recommends new Federal bureaucratic structures to assist states.

It was our hope that ACIR would provide a context in which to consider ways to further address state and local governments' concerns while maintaining our commitment to national objectives. We recognize that a vote against the report could be viewed as a vote against the states and for "unfunded mandates." We nevertheless feel that the report presents a one-sided, fundamentally flawed analyses and that we should not support it.

You have a strong record on unfunded mandates. You signed Executive Order 12875 during your first year in office to ensure that new regulations do not place undue burdens on states and communities. In March of 1995, you signed the Unfunded Mandates Reform Act. In March of this year we reported to Congress on the significant progress Federal agencies have made in implementing the Act. The Administration has also worked cooperatively with state and local governments to help them take full advantage of the flexibility that already exists in many Federal statutes. As ACIR concludes its work, we will work to ensure that your record and our reasons for opposing the Commission's report are well understood.

[Does this need action/response or is it FYI??]

EPA Draft
7/5

Honorable Governor Winter
Chairman
U.S. Advisory Commission on
Intergovernmental Relations
800 K Street, N.W.
Suite 450, North Building
Washington, D.C. 20575

Dear Governor Winter:

Administrator Carol Browner has asked that I respond to your recent request for comments on the June 25, 1996 *Draft Report on the Role of Federal Mandates in Intergovernmental Relations*. We have put forth our best effort to review the revised draft, even though we were given less than a week to respond. In order to meet your deadline, I wanted to give you some initial thoughts and to highlight some areas where we have major problems. Regrettably, because of the extremely limited time frame provided for review and comment between receipt of the draft and distribution of revised material to all Commission members, we have once again not been able to give this draft the time and attention it requires prior to the meeting.

Although the current draft of the report represents a definite improvement over the first draft, it remains unacceptable in its present form. The report still fails to fulfill the fundamental charge given the ACIR in the Unfunded Mandates Reform Act (UMRA): to investigate and review the role of federal mandates in intergovernmental relations and their impact on government objectives, the private sector, and the nation's citizens. In addition, as described below, many of the key issues raised in our March 5 letter to you and in extensive material shared with the ACIR staff also remain.

^{disparities?}
Perhaps most troubling is that the tone of the report continues to lack balance. The failure to address benefits in the report creates an inevitable imbalance in the presentation of this complex issue. As stated in Administrator Carol Browner's letter of March 5, 1996 to you and my letter to Commission staff dated June 23, 1995, UMRA charged the Commission with considering not only the problematic aspects of mandates, but the beneficial aspects as well. Despite the Commission having voted explicitly to instruct the staff to address benefits as well as problem, this draft of the report again fails to discuss benefits in a serious way.

For example, the draft makes no mention of the tremendous health benefits associated with the Clean Air Act. The Clean Air Act has had tremendous, well-documented beneficial effects. Of the 98 areas of the country originally designated as "non-attainment" areas for ground-level ozone, 55 of those now have clean air and 22 have formally been redesignated to "attainment". As a result, 140 million people now live in areas where they experience reduced mortality, reduced airway resistance among asthmatics, and reduced respiratory illness. Emissions of particulate matters have been cut 78%, carbon monoxide by 25%, and smog-forming volatile organic compounds by 24%. All of this has been accomplished while the domestic economy has grown by 71% and the U.S. population by 25%.

With regard to the Clean Water Act, the report does not capture the high value the public places on clean water and their expectation that government will be practical but protective in ensuring air and water quality. While any undertaking as complex as protecting water quality will generate some disagreement and uncertainty, this draft of the report seems to identify minor issues needing attention without acknowledging the dramatic success of the Clean Water Act to date.

Similarly, no mention is made of the benefits associated with the Safe Drinking Water Act. Prior to passage of the Safe Drinking Water Act (SDWA), a Congressional study found that only 10 to 15% of water systems conducted adequate testing for microbiological safety; that one-third of systems that tested found contamination exceeding the voluntary standards then set by the U.S. Public Health Service, and that 565 of systems had physical deficiencies that could seriously affect safety. Today, in contrast with the record of limited compliance with the 21 voluntary PHS standards, about 70 percent of systems fully comply with today's more protective SDWA standards.

We were disappointed that information such as this was not included in this draft of the Commission's report despite our efforts to supply it to ACIR staff. Failure to include a discussion of the beneficial aspects of a mandate necessarily focuses the reader only on the negative attributes of federal mandates, inevitably creating an unbalanced tone.

Moreover, this version of the report also fails to acknowledge innovations the federal agencies have instituted since the President signed Executive Order 12875 on Enhancing the Intergovernmental Partnership and passage of UMRA. For example, one of the recommendations calls for desk officers to be assigned for each state as a single point of contact. EPA has in fact instituted such a practice. By recommending such changes but not recognizing where such practices already exist, the perception of a persistent problem is perpetuated when in fact credit for implementing a solution should be expressed. *self-serving*

Another major concern has to do with the "Common Issues" section. We continue to have strong concerns about one of the common issues identified in the report -- the authority of citizens to go to court to assure enforcement of laws to protect their health and the environment. We fundamentally disagree with the staff analysis presented in the July draft. The ACIR's own statistics reinforce our experience at EPA that citizen suits to enforce environmental laws have not imposed a significant burden overall on state, local, and tribal governments. As the examples

acknowledged

cited in our March 5, 1996 letter demonstrate, citizen suits can be very important in the rare instances where a government has exhibited an egregious failure to act to protect public health or the environment. Congress has explicitly empowered citizens to take action where the federal or state governments have failed to do so. Citizen suits are a critical check not only on state and local governments, but also on the federal government. We see no value in establishing yet another federal commission to study this matter.

*
conflicts
w/ Hale
letter

We also have serious concerns about other aspects of the "Common Issues" section. For example, confusion about the boundaries between federal and state responsibilities was frequently identified in written comments to the Commission as a major problem plaguing local governments. Yet that issue is just touched upon and the draft implies that the federal government is responsible for "fixing" the problem when it seems more reasonable to suggest that a joint solution is warranted. This draft of the report also introduces several new recommendations that could prove extremely problematic in practice for all parties involved and should be deleted, such as the recommendation for a binding arbitration process.

In addition to the problems of tone and the general issues raised above, we continue to have many concerns about the statute-specific recommendations in the June 25 draft. Although the current draft of the report is substantially improved from the earlier one, significant problems remain. One area of concern with the statute-specific recommendations is that the "Recommendation" and "Recommendation Rationale" sections do not logically follow from the issues raised in the "Intergovernmental Concerns" section. For example, in the Clean Water Act discussion, the majority of issues raised pertain to small communities, yet none of the recommendations pertains to small community issues. For both editorial and substantive reasons, this problem needs to be corrected.

Another area of concern pertaining specifically to the Clean Water Act has to do with the draft's recommendation that EPA be given authority to extend compliance deadlines on a case-by-case basis. EPA and states now negotiate such extensions with individual communities through administrative orders, permit conditions, or state alternative compliance agreements with small towns. They are able to do so within the existing statutory framework, which affords sufficient flexibility but that also preserves the need for fairness across communities. The recommendation to amend the Act to deal with compliance deadlines is ill-advised and should be deleted.

Similarly, while the Safe Drinking Water Act section of the report has been significantly improved, problems remain. The recommendation is very time-specific and has not been updated to reflect recent bi-partisan legislative activities in the House. It seems much more sensible for the report to make recommendations to address specific problems that have been identified: the need to address the high per capita costs of small systems, to allow EPA to examine health effects and occurrences of specific contaminants in determining priorities for standard-setting and to consider costs and benefits in standard-setting, to provide more implementation authority for states and to provide federal financial assistance for drinking water to states and localities.

We are also concerned about several specific parts of the draft report that are misleading or erroneous. For example, the draft suggests that federal laws compelled states to "cede control over water pollution" (the last three lines of p.18). That is just not the case. Water quality protection is an intergovernmental effort, including in the area of financing sewage treatment projects. States have not "ceded control" over water pollution to the federal government; it is and always has been a partnership. The report also erroneously suggests that the EPA is requiring communities to attain "zero discharge" of pollutants and that there has been a "phase out" of federal financial assistance. These sorts of statements need to be deleted from the report altogether.

The draft also includes multiple other technical errors that warrant correction to avoid confusion and misinterpretation, such as the way the text discusses pollutants from stormwater discharge, toxic pollutants from sewage sludge, and descriptions of federal funding levels.

Although we agree with the draft report's recommendations to make no changes in the Clean Air Act and to continue to support federal funding and technical assistance to ensure that EPA and the States can meet the requirements of the Clean Air Act Amendments of 1990, this section continues to suffer from serious problems noted: it ignores progress resulting from the presence of the federal role in these policy areas.

In summary, while this draft represents an improvement over the March 1996 version, significant problems remain. We have provided examples of the problems we identified in the short period we had for review, but have not in any way been able to provide a complete analysis or proposed revisions. As you know, we commented extensively on the previous draft. I regret that we cannot support the current draft, especially given the hard work and long hours I know has been put into this revision by both the ACIR and our EPA staff.

As you know, EPA is committed to building strong and effective working partnerships with state, local, and tribal governments, and we are making great progress in fulfilling that commitment. We also remain committed to working with ACIR to maintain the reputation it has had for producing solid analysis that advances open and honest public debate and understanding. Therefore, we would have to strongly urge that the ACIR Commissioners reject the current and previous draft of the report. While improvements have been made, significant weaknesses and problem areas remain.

Administrator Browner, Deputy Administrator Fred Hansen, and I remain ready to assist you as you feel appropriate in this effort. Please feel free to call any one of us if you would like to discuss this issue further.

Sincerely,

Shelley H. Metzenbaum
Associate Administrator

07/04/96 23:45 2024566220
07/05/96 12:01

006
0007000

cc. Carol M. Browner, Administrator
Fred Hansen, Deputy Administrator

THE WHITE HOUSE
WASHINGTON

March 1, 1996

The Honorable William F. Winter
Chairman
U.S. Advisory Commission on
Intergovernmental Relations
800 K Street, NW
Suite 450, South Building
Washington, DC 20575

Dear Governor Winter:

I am writing to express my deep concerns about the preliminary staff draft of the Advisory Commission on Intergovernmental Relations (ACIR) Report: *The Role of Federal Mandates in Intergovernmental Relations*. The draft report fails to respond to key questions the Congress posed to ACIR, and instead focuses on policy issues well outside of ACIR Congressional mandate or area of expertise. In addition, the draft report discusses the costs of mandates largely without examining their benefits. As a member of the Commission, I oppose many of the specific recommendations in the report, and would like to work with you and other members of ACIR to develop a more balanced report of the Commission's work.

As you know, Title III of the Unfunded Mandates Reform Act of 1995 directs ACIR to: (1) "review the role of Federal mandates in intergovernmental relations and their impact on State, local, tribal, and Federal government objectives and responsibilities, and their impact on the competitive balance between State, local, and tribal governments, and the private sector and consider views of and the impact on working men and women on those same matters;" (2) investigate the role of unfunded State mandates on local governments; (3) make recommendations in seven different general areas, including providing flexibility and reconciling inconsistent mandates; and (4) identify specific mandates that should be addressed in each of these areas. Congress also instructed the ACIR to examine measurement and definitional issues involved in calculating total costs and benefits of Federal mandates.

The preliminary staff draft report does not adequately reflect this Congressional charge. Unfortunately, the draft report focuses on the requirements of specific statutes without establishing a sufficient framework for their consideration. The report does little to further consensus on fundamental questions such as how state mandates affect local governments and how we should measure the costs and benefits of mandates. Instead, it presents cursory and often misleading analyses of 14 Federal health, safety, environmental,

worker protection, and civil rights laws. These analyses fail to consider the views of or effects on working men and women as directed by Congress.

For example, the preliminary staff draft recommends that Congress repeal the Family and Medical Leave Act's (FMLA) applicability to state and local governments. The Clinton Administration opposes this recommendation. The draft report asserts that the FMLA has "created unfunded costs related to extending medical insurance coverage to employees while on leave, to temporary hiring of replacement workers, and to additional training and personnel counseling activities..." The report cites no supporting evidence for this claim, however. Further, the report does not acknowledge the substantial benefits to employers, families, and individuals of implementing FMLA requirements. In addition, the Administration strongly opposes the recommendations that would weaken other labor protections including proposed changes to OSHA, the Fair Labor Standards Act and Davis-Bacon-related acts.

The preliminary staff draft also recommends several generic modifications to Federal laws without carefully considering the consequences of such changes. For example, the draft report proposes eliminating citizens' rights to sue state and local governments to enforce Federal mandates. The Administration strongly opposes this broad-sweeping change. Again, the recommendation is based on a consideration of costs but not of benefits. The draft report simply asserts that citizen suits create "budgetary uncertainties and substantial legal costs" for state and local governments. The draft report does not document or quantify these costs, or discuss the constructive role citizen suits have played in strengthening enforcement of civil rights, environmental, and other Federal statutes.

The draft report's proposed changes to specific environmental laws are similarly disconcerting. The preliminary staff draft recommends -- again without adequate justification -- substantially weakening Federal environmental statutes. For example, the draft report recommends eliminating financial aid penalties for states that fail to meet Federal air quality standards where such states are making a good faith efforts to comply. The Administration opposes this proposal. As the draft report itself notes, most states did not adequately control air pollution until strong Federal standards and enforcement mechanisms were put in place. Now that sanctions are mandatory, states, with a few exceptions, are meeting compliance deadlines, although sanctions have almost never been applied..

Another particular concern is the report's recommendations with respect to civil rights laws for people with disabilities -- specifically, the Americans with Disabilities Act (ADA) and the Individuals with Disabilities Education Act (IDEA). The Administration opposes the draft report's recommendations with respect to these laws. Since the Unfunded Mandates Reform Act does not apply to civil rights statutes, it is inappropriate for ACIR to recommend changes to these laws. The draft report's recommendations to eliminate a private right of action and to reduce state and local governments' compliance obligations under these statutes would set back our efforts to guarantee equal rights for citizens with disabilities. I would note that both of these laws allow Federal agencies to emphasize education and voluntary compliance as much as possible, and that this Administration has taken a cooperative and flexible approach in implementing the ADA and IDEA.

I am also concerned about the process for seeking public comment on the staff draft. I urge you to ensure full public participation in the Commission's deliberations. I understand the ACIR is sponsoring a March 6-7 Conference on Federal mandates and is charging an admission fee. In my opinion, charging a fee in this context is inappropriate since it creates a barrier to full public participation. I strongly endorse an accessible public meeting to seek comment on ACIR's activities.

As you know, the Clinton Administration has worked hard to strengthen the intergovernmental partnership and to address state and local government concerns about unfunded mandates. The President signed Executive Order 12875 during his first year in office to ensure that new regulations do not place undue burdens on states and communities. In March of 1995, he signed the Unfunded Mandates Reform Act. In addition, the Administration has proposed or supported modifying a number of Federal laws to ease the public sector's compliance burden. Further, in implementing Federal laws, the Administration has sought to provide state and local governments with enhanced technical assistance and to help them take full advantage of the flexibility that already exists in many Federal statutes.

I have additional serious concerns about many of the draft report's recommendations not mentioned in this letter. Attached are comments prepared by Federal agencies and departments on the draft report. Federal agencies will also be forwarding comments to you and the Commission directly. I urge you to give their comments full consideration as the Commission redrafts the report.

Sincerely,

A handwritten signature in black ink, appearing to read "Marcia Hale", written in a cursive style.

Marcia Hale
Assistant to the President and Director for
Intergovernmental Affairs

Attachments

cc:

ACER -

- Frank

- July 5th

EPA - letter to

- Need people to agree with us - contacting other
Commission members -

→ Maria - ones that they had reached are
Aire -

- ~~Final~~ All members should be called -

Any public stmt they make in support
of this will be used against them

- July 23rd Hall of States

Miller

THE WHITE HOUSE
WASHINGTON

March 1, 1996

The Honorable William F. Winter
Chairman
U.S. Advisory Commission on
Intergovernmental Relations
800 K Street, NW
Suite 450, South Building
Washington, DC 20575

Dear Governor Winter:

I am writing to express my deep concerns about the preliminary staff draft of the Advisory Commission on Intergovernmental Relations (ACIR) Report: *The Role of Federal Mandates in Intergovernmental Relations*. The draft report fails to respond to key questions the Congress posed to ACIR, and instead focuses on policy issues well outside of ACIR Congressional mandate or area of expertise. In addition, the draft report discusses the costs of mandates largely without examining their benefits. As a member of the Commission, I oppose many of the specific recommendations in the report, and would like to work with you and other members of ACIR to develop a more balanced report of the Commission's work.

As you know, Title III of the Unfunded Mandates Reform Act of 1995 directs ACIR to: (1) "review the role of Federal mandates in intergovernmental relations and their impact on State, local, tribal, and Federal government objectives and responsibilities, and their impact on the competitive balance between State, local, and tribal governments, and the private sector and consider views of and the impact on working men and women on those same matters;" (2) investigate the role of unfunded State mandates on local governments; (3) make recommendations in seven different general areas, including providing flexibility and reconciling inconsistent mandates; and (4) identify specific mandates that should be addressed in each of these areas. Congress also instructed the ACIR to examine measurement and definitional issues involved in calculating total costs and benefits of Federal mandates.

The preliminary staff draft report does not adequately reflect this Congressional charge. Unfortunately, the draft report focuses on the requirements of specific statutes without establishing a sufficient framework for their consideration. The report does little to further consensus on fundamental questions such as how state mandates affect local governments and how we should measure the costs and benefits of mandates. Instead, it presents cursory and often misleading analyses of 14 Federal health, safety, environmental,

worker protection, and civil rights laws. These analyses fail to consider the views of or effects on working men and women as directed by Congress.

For example, the preliminary staff draft recommends that Congress repeal the Family and Medical Leave Act's (FMLA) applicability to state and local governments. The Clinton Administration opposes this recommendation. The draft report asserts that the FMLA has "created unfunded costs related to extending medical insurance coverage to employees while on leave, to temporary hiring of replacement workers, and to additional training and personnel counseling activities..." The report cites no supporting evidence for this claim, however. Further, the report does not acknowledge the substantial benefits to employers, families, and individuals of implementing FMLA requirements. In addition, the Administration strongly opposes the recommendations that would weaken other labor protections including proposed changes to OSHA, the Fair Labor Standards Act and Davis-Bacon-related acts.

The preliminary staff draft also recommends several generic modifications to Federal laws without carefully considering the consequences of such changes. For example, the draft report proposes eliminating citizens' rights to sue state and local governments to enforce Federal mandates. The Administration strongly opposes this broad-sweeping change. Again, the recommendation is based on a consideration of costs but not of benefits. The draft report simply asserts that citizen suits create "budgetary uncertainties and substantial legal costs" for state and local governments. The draft report does not document or quantify these costs, or discuss the constructive role citizen suits have played in strengthening enforcement of civil rights, environmental, and other Federal statutes.

The draft report's proposed changes to specific environmental laws are similarly disconcerting. The preliminary staff draft recommends -- again without adequate justification -- substantially weakening Federal environmental statutes. For example, the draft report recommends eliminating financial aid penalties for states that fail to meet Federal air quality standards where such states are making a good faith efforts to comply. The Administration opposes this proposal. As the draft report itself notes, most states did not adequately control air pollution until strong Federal standards and enforcement mechanisms were put in place. Now that sanctions are mandatory, states, with a few exceptions, are meeting compliance deadlines, although sanctions have almost never been applied..

Another particular concern is the report's recommendations with respect to civil rights laws for people with disabilities -- specifically, the Americans with Disabilities Act (ADA) and the Individuals with Disabilities Education Act (IDEA). The Administration opposes the draft report's recommendations with respect to these laws. Since the Unfunded Mandates Reform Act does not apply to civil rights statutes, it is inappropriate for ACIR to recommend changes to these laws. The draft report's recommendations to eliminate a private right of action and to reduce state and local governments' compliance obligations under these statutes would set back our efforts to guarantee equal rights for citizens with disabilities. I would note that both of these laws allow Federal agencies to emphasize education and voluntary compliance as much as possible, and that this Administration has taken a cooperative and flexible approach in implementing the ADA and IDEA.

I am also concerned about the process for seeking public comment on the staff draft. I urge you to ensure full public participation in the Commission's deliberations. I understand the ACIR is sponsoring a March 6-7 Conference on Federal mandates and is charging an admission fee. In my opinion, charging a fee in this context is inappropriate since it creates a barrier to full public participation. I strongly endorse an accessible public meeting to seek comment on ACIR's activities.

As you know, the Clinton Administration has worked hard to strengthen the intergovernmental partnership and to address state and local government concerns about unfunded mandates. The President signed Executive Order 12875 during his first year in office to ensure that new regulations do not place undue burdens on states and communities. In March of 1995, he signed the Unfunded Mandates Reform Act. In addition, the Administration has proposed or supported modifying a number of Federal laws to ease the public sector's compliance burden. Further, in implementing Federal laws, the Administration has sought to provide state and local governments with enhanced technical assistance and to help them take full advantage of the flexibility that already exists in many Federal statutes.

I have additional serious concerns about many of the draft report's recommendations not mentioned in this letter. Attached are comments prepared by Federal agencies and departments on the draft report. Federal agencies will also be forwarding comments to you and the Commission directly. I urge you to give their comments full consideration as the Commission redrafts the report.

Sincerely,

A handwritten signature in black ink, appearing to read "Marcia Hale", written in a cursive style.

Marcia Hale
Assistant to the President and Director for
Intergovernmental Affairs

Attachments

cc:



UNITED STATES DEPARTMENT OF LABOR

FACSIMILE TRANSMISSION

OFFICE OF CONGRESSIONAL AND INTERGOVERNMENTAL AFFAIRS

200 Constitution Avenue, N.W.
Room S-1325
Washington, DC 20210

Confirmation: 202/219-6141

May 1, 1996

TO: KRIS BALDERSTON

DEPARTMENT/COMPANY:

FACSIMILE NUMBER:

FROM: EARL COHL

NUMBER OF PAGES INCLUDING COVER: 15

FACSIMILE REPLIES:

CONGRESSIONAL AFFAIRS

202/219-5120

INTERGOVERNMENTAL AFFAIRS

202/219-5736

IMMEDIATE OFFICE OF THE ASSISTANT SECRETARY

202/219-5288

MESSAGE: ACIR alternative positons

The Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) (29 U.S.C. 201, et seq.) sets national standards for minimum wage, overtime compensation, equal pay, child labor and recordkeeping for most workplaces in the United States. Enacted in 1938 and linked to the Commerce Clause of the Constitution, its goals were to correct and eliminate labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers without substantially curtailing employment or earning power. In describing these objectives, the U.S. Supreme Court, speaking through Justice Burton, also observed: "The Act declared its purpose in broad and sweeping terms. Breadth of coverage was vital to its mission. Its scope was stated in terms of substantial universality..."¹

Thus, in order to effectuate the remedial purposes of the Act, FLSA's coverage is construed broadly, while exemptions from the Act's protections are construed narrowly. In addition, Congress, through successive amendments, has expanded the Act's coverage. In 1966, Congress covered employees of certain publicly-operated institutions, principally schools and hospitals.²

The Education Amendments of 1972 further extended FLSA coverage to employees of public pre-schools. In 1974, Congress covered virtually all remaining State and local government employees not covered by the 1966 and 1972 Amendments. The 1974 Amendments were challenged as unconstitutional in National League of Cities v. Usery and, in 1976, the Supreme Court held that FLSA's minimum wage and overtime pay standards could not be applied constitutionally to employees of State and local governments engaged in integral or "traditional" government activities.³ The Court ruled that FLSA could be applied to employees of State and local governments engaged in non-traditional activities.

¹ Powell v. United States Cartridge Co., 339 U.S. 497 at 509, 516 (1950).

² Two years later, the U.S. Supreme Court upheld the constitutionality of including state-operated hospitals and schools under FLSA's "enterprise" coverage concept in Maryland v. Wirtz, holding that Congress had the power to subject a State to the same minimum wage and overtime pay limitations as other employers whose activities affect commerce; and, where a State engages in economic activities that are validly regulated by the Federal Government when engaged in by private persons, the State may be required to conform to Federal regulations.

³ Thus, this decision overruled the earlier Wirtz decision.

In 1985, the Supreme Court completely reversed National League of Cities in Garcia v. San Antonio Metropolitan Transit Authority. In so doing, it restored full application of FLSA to State and local governments. The Court concluded that the "traditional governmental function" test was unworkable and inconsistent with established principles of federalism. In order to mitigate FLSA's impact on State and local governments following this ruling, Congress amended FLSA in 1985 to give special accommodations to State and local governments by allowing for compensatory time off in lieu of overtime pay, providing special rules relating to the use of volunteers, and delaying implementation of compliance obligations to allow for a transition period.

In 1995, Congress passed the Congressional Accountability Act which expanded FLSA coverage to its own employees.

Benefits and Concerns

FLSA provides fundamental worker protections that, for the most part, are now national in scope. The Act ensures that minimum employment standards are observed in the working relationship between nearly every employer and employee in fulfillment of its original purpose -- to eliminate conditions detrimental to the health, efficiency, and general well-being of workers and the economy. The Act requires that covered workers be paid at least the minimum wage and that non-exempt, covered workers be paid premium pay for time worked over 40 hours in a week; it does not proscribe work schedules, when a workweek must start, how many hours workers should work in a week or day.

Concerns of State and local governments include:

- ▶ Considerable confusion has arisen since the Garcia decision over proper implementation of FLSA in the State and local public sector; improper claiming of FLSA's "executive, administrative, and professional employee" exemption from overtime pay continues to confound many State and local governments.
- ▶ Due to inadequate monitoring of compliance obligations and widespread misunderstanding of FLSA's requirements, State and local governments' confusion over the overtime pay provisions has resulted in significant litigation, with employees winning substantial retroactive back pay awards for unpaid overtime pay. Litigation costs are substantial, even if the State or local government successfully defends its employment policies.

- ▶ FLSA is viewed by some as intrusive because it requires State and local governments to implement employment policies they would not have to implement without the Federal law.

Innovations to Mitigate Burdens

Following the 1985 FLSA Amendments, DOL provided substantial guidance and technical assistance to State and local governments in efforts to educate them on their compliance obligations. Letter rulings that give expert advice on the law continue to be available to guide public agencies in their decision making on FLSA issues. These Opinion Letters, written in response to inquiries on fact-specific situations, can be used as part of a good faith defense against alleged violations in subsequent court actions.⁴

In 1992, after a series of court decisions involving public employers progressively narrowed the exemption for executive, administrative, and professional employees, DOL revised the regulations to grant a special exception to the "salary basis" test for State and local governments to allow partial-day deductions from pay when accrued leave is not used to cover the absence, based on public accountability principles and restrictions against paying public employees for time not actually worked.

Recommendation

Make no statutory changes in the FLSA. However, much of the expense of litigation might be avoided if State and local governments enlisted DOL's assistance in understanding their compliance obligations under the law, particularly the requirements for employee exemptions under the FLSA. The Department of Labor should be provided additional resources to develop training and technical assistance publications in order to provide guidance to State and local governments under the FLSA. State and local governments should seek specific guidance from DOL through the letter ruling process on any difficult issues confronting them.

⁴ See sections 9 and 10 of the Portal-to-Portal Act of 1947 and Regulations, 29 CFR Part 790. These letter rulings must come from the Administrator of the Wage and Hour Division of the Department of Labor.

Family and Medical Leave Act

The Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. 2601 et seq.) requires employers to grant eligible employees up to 12 workweeks of unpaid, job-protected leave each year for specified family and medical reasons, and to maintain group health benefits during the leave. Employees must be restored to the same or equivalent position at the end of the leave. In certain limited cases when an employee chooses not to return to work at the end of the leave, the employer may recover its costs of maintaining group health insurance during the leave. Enacted in 1993, FMLA became effective for most employers in August 1993. However, the effective date was delayed for employers with collective bargaining agreements, to give employers and employees some flexibility in bargaining on FMLA-related issues.

The FMLA allows employees to better balance work and family needs by taking reasonable, temporary unpaid leaves for the birth and care of a newborn child; for placement of a child for adoption or foster care; to care for a child, spouse or parent with a serious health condition; and for an employee's own serious health condition that makes the employee unable to work. The FMLA was enacted to advance national interests in preserving family stability and promoting economic well-being among working men and women through greater job security and more flexibility to meet important family responsibilities.

Employers were also expected to realize significant benefits from improved worker productivity and morale, reduced employee turnover, reduced need to hire and train permanent replacement workers, and greater labor-management stability. Any costs of implementation were expected to be mitigated by the fact that the leave was unpaid and many employers already had family and medical leave policies in place, particularly in those States where similar requirements had already been enacted. The General Accounting Office calculated that the primary costs associated with FMLA would relate to extending medical benefits and hiring temporary replacements during covered FMLA leave periods.

Benefits and Concerns

The FMLA makes a significant positive contribution toward the national policy objective of strengthening family stability and improving economic security for working men and women, particu-

larly during times of family or medical crises. It is sound public policy for workers, for families, and for employers. The bipartisan Commission on Leave conducted a nationally representative random sample survey of private sector worksites, the results of which were released in October 1995. The survey found that, for the vast majority of covered worksites, implementation of the FMLA resulted in either a small cost increase or no cost at all.

Concerns of State and local governments include:

- ▶ Because some State and local governments had leave policies in effect that varied from FMLA's requirements, there is a perception that the Federal law is not flexible enough.
- ▶ Some claim that FMLA compromises collective bargaining negotiations between State and local governments and public employee unions.
- ▶ Some reported significant costs related to training personnel specialists on the law's provisions and to the time spent counseling individual employees. Recordkeeping requirements for tracking FMLA leave were perceived as burdensome, especially in cases where both spouses work for the same employer.

Innovations to Mitigate Burdens

The FMLA does provide some flexibility for State and local governments in that no existing provision (including a provision in a collective bargaining agreement) need be changed if it provides greater rights or benefits than the Federal law. Also, leave granted pursuant to an employer's previously established policy, a collective bargaining agreement or State law requirements often can be counted as part of an employee's FMLA entitlement if the leave is taken for an FMLA-qualifying reason.

DOL consulted representatives from State governments with State FMLA laws to discuss policy issues arising under the Federal law and sought their input in formulating regulatory provisions. To the extent the Federal statute allowed, efforts were made to minimize regulatory burdens at the lowest levels essential for determining compliance with statutory requirements. A user-friendly "question and answer" format was adopted to make the implementing rules easily understood.

DOL also conducted an extensive FMLA outreach and education effort. The Department prepared and distributed comparisons of State and Federal family and medical leave laws to assist employers in States with similar requirements in understanding their compliance obligations. Fact sheets and compliance guides were also distributed. DOL representatives were made available for speaking engagements and presentations on FMLA compliance issues. Technical assistance continues to be provided, including through letter rulings that give expert advice on the law.

Recommendation

Make no statutory changes in the FMLA. The law enjoys high approval and widespread support. State and local governments should obtain technical assistance from DOL in understanding their compliance obligations under the law. Specific guidance should be sought through the letter ruling process on any difficult compliance issues confronting them.

Davis-Bacon and Related Acts

The Davis-Bacon Act (40 U.S.C. 276a, et seq.) applies to Federal contracts over \$2,000 for construction, alteration or repair, including painting and decorating, of public buildings and public works. A covered contract must specify the minimum wages to be paid by contractors and subcontractors to the various classes of laborers and mechanics working on the contracts. The minimum wages are based on the wages found prevailing by the Secretary of Labor for corresponding classes of laborers and mechanics on similar projects in the local area where the work is to be performed.

The Davis-Bacon Act was enacted in 1931 at a time when the Federal Government had begun a substantial building program across the United States. Requirements to award construction contracts to the lowest bidder and limited available work opportunities were causing a downward spiraling of local wage levels as out-of-town contractors underbid local contractors for Federal projects and then paid employees substandard wage levels, thereby disrupting local economies. Recognizing the vast influence of the Federal Government's purchasing power on local economies, Congress enacted Davis-Bacon's prevailing wage protections to bring stability to the construction industry by creating a wage floor which would stop the downward-spiral of wages. The Act was patterned after similar State prevailing wage laws.

Congress extended Davis-Bacon's prevailing wage protections through about 60 other enabling statutes that authorize Federal grants, loans, and other assistance for construction projects meeting various public purposes and needs (e.g., highways, waste water treatment plants, low-income housing, etc.). These laws are known as the Davis-Bacon Related Acts (DBRA). (Under most Related Acts, State and local government employees working on a construction project are not covered by the prevailing wage requirements.)

With a renewed emphasis on reducing the costs of government and awarding contracts based on price to the lowest responsible bidder, it is evident that the basic purpose of the original Act continues to be relevant today.⁵

Benefits and Concerns

DBRA prevailing wage requirements provide an important mechanism to equalize the opportunity for local construction contractors to bid on Federally-funded work through the competitive bid process, without undermining workers' wage levels. These laws protect both local economies and workers' wages from the unscrupulous contractors that would undercut workers' wages as a means to gain a competitive advantage in bidding. Unfortunately, even today, in a labor-intensive industry like construction, an expedient way to lower bid prices is to cut labor costs. The resultant sub-standard wages are often accompanied by shoddy construction practices and inferior quality, ultimately leading to higher costs for the building or project owner.

Concerns of State and local governments include:

- ▶ Reporting and recordkeeping are perceived to be burdensome and may make it difficult for small businesses to compete. Reduced competition may increase construction costs.
- ▶ Because some low-wage contractors may pay less than prevailing wages in an area, there is a perception that DBRA prevailing wages increase the total costs of construction. Some feel that increased costs may divert available resources from other needy projects.
- ▶ There is a perception that DOL's method of determining DBRA prevailing wages through voluntary surveys, and a lack of data from some areas, may skew the results and produce higher wage levels.

⁵ Congress strengthened Davis-Bacon protections on several occasions -- in 1935, when it lowered the original \$5,000 contract coverage threshold for applicability to \$2,000, and in 1964 when it amended the wage and fringe benefit requirements of the law.

Innovations to Mitigate Burdens

DBRA prevailing wage determinations are based on measures of central tendency. If a single wage has not been paid to more than half the workers in a classification determined through survey (i.e., a "majority" rate), then the weighted average rate is used as the prevailing rate. Thus, there will always be some contractors who pay less than prevailing wages for an area.

The Department of Labor adopted significant regulatory changes over the past decade in an effort to ensure that DBRA prevailing wage determinations accurately reflect wages being paid in local communities. To prevent the importation of non-local wage data in the survey process, DOL specifies that when there is not enough recent construction in an area, wage data from nearby surrounding areas will be used -- not distant areas. DOL rules prohibit using projects in metropolitan areas for setting DBRA prevailing wage rates in dissimilar rural areas. DBRA regulations also encourage apprenticeship and training of persons with limited experience at lower wage rates in approved training programs.

Recommendation

There appears to be little disagreement with the view that the Act's requirements could be updated, and that a balance is needed between the administrative costs associated with the requirements and the intended goals and socio-economic benefits to be achieved. The Clinton Administration, in an effort to explore alternative methods for achieving the intended benefits of Davis-Bacon at lower costs, developed a reform approach in 1994. The Clinton reform bill would have raised the Related Act threshold to \$50,000 for alteration and repair projects, and \$100,000 for new construction projects, and made other changes to reduce administrative burdens and costs while maintaining its essential worker protections. This reform proposal was introduced in 1994 but not acted upon by the Congress.

Raising the threshold for defining covered contracts would reduce the volume of smaller contracts subject to DBRA requirements while assuring that larger publicly-funded projects contain necessary labor standards protections. Simplifying recordkeeping requirements and reducing reporting burdens would further reduce contractor costs on publicly-funded projects, thereby lowering

funding requirements and possibly encouraging more competition. The Administration and Congress should work together to bring about balanced reform of the Davis-Bacon and Related Acts.

Occupational Safety and Health Act

The Occupational Safety and Health Act of 1970 (OSH Act) grants the Occupational Safety and Health Administration (OSHA) broad authority to protect the safety and health of American workers. OSHA's authority extends to private sector employers with one or more employees. The OSH Act requires OSHA to establish workplace safety and health standards, conduct inspections, enforce the standards, issue citations and propose monetary penalties for violations. OSHA is also authorized to provide training, education and information, and to encourage cooperative programs with employers in order to reduce workplace hazards.

When OSHA was created in 1970, the Congress chose not to cover state and local government employees directly for several reasons. The Supreme Court had ruled, in cases involving other statutes, that the Federal Government had no authority to cover state and local government employees. Also, the philosophy of "states' rights" retained some influence in the Congress, preventing enactment of laws regulating many state activities directly. Despite these concerns, the Congress considered it important to extend protection to state and local employees. As part of a compromise giving states a role in occupational safety and health, states were given the option of voluntarily choosing to adopt an OSHA program for private and public sector workers. Since 1970, twenty-five states or jurisdictions have chosen to operate OSHA programs. Two states -- New York and Connecticut -- operate plans covering only their public employees.

Since only about one-half of the states participate, approximately 7 million public employees have no federal or state safety and health protection. ACIR recognizes that this is a problem. Public employees are not second-class citizens. They perform dangerous tasks (such as firefighting and hazardous waste removal) and deserve the same protection as workers in the private sector. A list of public employees killed on the job, which was submitted by the American Federation of State, County, and Municipal Employees (AFL-CIO) to the Senate Labor and Human Resources Committee in 1992, described some of the hazards faced by public sector workers. Among the dangers causing death were asbestos-related disease, electrocutions, crushing accidents from crane booms, and suffocation in confined spaces.

A most graphic example of the serious hazards often faced by public employees was provided in testimony before a Senate Labor Subcommittee by Amy Delguizzo, who described her father's agonizing death after a trench collapsed as he was fixing an underground pipe leak. Her father, an employee of the city of Madeira, Ohio, was trapped under layers of dirt for 20 minutes before rescue workers could set him free. He was revived and taken to a local hospital where he died. Sadly, this worker's death could have been prevented if proper trenching safety practices had been following by the city. However, Mr. Delguizzo's employer, a public entity, had no legal obligation to comply with these rules.

Benefits and Concerns

There are significant benefits when states adopt plans to protect their workers. Public employees have the right to safe and healthful workplaces and the right to have a government agency which protects worker safety and health. State and local employers may realize lower workers compensation costs, increased productivity from their workers, less property damage and fewer interruptions in work from accidents. According to the National Safety Council, the public sector accounts for 16 percent of all costs associated with workplace deaths and injuries. Removing unsafe work conditions for state and local employees may also protect the public since all those who enter public buildings are also exposed to hazards present in such worksites.

Protection of public employees is not an unfunded mandate; it is a moral obligation for all employers. Federal OSHA pays 50 percent of the costs to the 25 states which already cover their workers voluntarily. Providing safety and health protection to workers is a responsibility assumed by all private employers in this Nation as well as one-half of the states.

Concerns of State and local governments include:

- ▶ There is widespread misunderstanding as to what is required by OSHA and what is required by state and local governments.
- ▶ There is a lack of understanding of the rationale and basis for safety and health standards. The program's rules are perceived as being rigid and burdensome (especially record-keeping or reporting requirements).

- ▶ There is a perception that the program is more focused on punitive measures than compliance assistance.
- ▶ More federal money is needed for state safety and health programs.

Innovations to Mitigate Burdens

A number of states have protected public employees for almost twenty-five years. There has been no outcry about the costs of protecting their workers; when states or localities experience financial difficulty in complying with OSHA standards, state OSHA programs allow flexible compliance periods or alternative, less costly ways of protecting workers. A number of states have even adopted penalty systems for their public employee programs although OSHA does not require this feature of the federal program.

OSHA allows states which provide public employee coverage to design their own programs. As long as they are at least as effective as Federal OSHA, they do not have to be an exact replica. For instance, states are allowed to establish their own safety and health standards to deal with situations unique to their workplaces. Secretary of Labor Reich has emphasized that it is important to consider the impact on states and municipalities of maintaining a program as well as correcting hazards found in public workplaces. The Secretary recommended a phase-in period for coverage of all public employees to give the states time to make changes necessary to comply with OSHA. The delay would take into consideration the legislative calendars for the states initiating coverage in the future.⁶

Recommendation

To ensure that public sector workers are adequately protected, ACIR recommends that existing state OSHA programs continue to cover their public employees with substantial financial assistance from the Federal Government. ACIR also recommends that public employees in the remaining states be covered. This could be accomplished in either of two ways: by covering the public

⁶ Testimony before the House Education and Labor Committee, February 10, 1994.

sector directly, as provided in bills considered by the 103rd and 104th Congresses;⁷ or, by encouraging states to adopt programs for public employees under section 18 of the OSH Act. ACIR recommends that, in the future, all states which adopt a program to protect public employees be allowed a lengthy phase-in period.

⁷H.R. 1280 & S.575, 103rd Congress; S. 1423 & H.R. 1834, 104th Congress (all expand OSHA coverage to state and local employees). See also H.R. 1834, 104th Congress (expands OSHA coverage to federal employees). There was bipartisan support for expansion). Thus, both the 103rd and 104th Congresses expressed support for direct coverage of some or all public employees. There was general recognition that public employees should be covered directly because the approach to federal employee coverage by Executive Order in the OSH Act does not provide adequate protection.

E X E C U T I V E O F F I C E O F T H E P R E S I D E N T

03-Mar-1996 06:08pm

TO: Elizabeth E. Drye

FROM: Dennis Burke
 Domestic Policy Council

SUBJECT: ACIR -- Drug and Alcohol Testing of Comm. Drivers

I think the Recommendation is a very bad idea and I am sure there are some Senior Staff that would strongly agree.

We are continually bragging about our record in encouraging drug testing -- w/ regards to the Clinton Administration's amicus curiae in the Student Athlete Drug Testing case and the President's Comprehensive Drug Testing Program for the Criminal Justice System.

I don't think it is smart for for us to turn around and say that motor carriers do not need to drug test -- when we know very well that it is a true safety issue.

The Clinton Administration believes that drug testing works in reducing drug use and is not intrusive.

In addition, the Justice Department is working on technology that will greatly reduce the cost of drug testing and make it more efficient and easier to administer. Right now, there are a few Administration-funded pilot programs in which a hair can be plucked and tested. It is getting cheaper every day to drug test.

Why can't we go w/ the 3rd recommended option -- give the state and local governments more flexibility but require drug testing to be part of the program? It is the additional requirements that accompany the testing that are so onerous to these govts (e.g conduct split sample testing w/ a laboratory that is certified by HHS., etc) not the testing, itself.

To tout drug testing in so many areas and brag about our funded technological advances but then say that motor carriers no longer have to be drug tested because of cost is going to look really stupid and open ourselves up to some justified criticism.

9:50.

THE WHITE HOUSE
WASHINGTON

April 23, 1996

Debbie
Diana
Diane

MEMORANDUM

TO: Sally Katzen
Marilyn Yager
Kris Balderston
Jennifer O'Connor
Elizabeth Drye
Bill White

Handled
4/24/96
B1

FROM: Marcia L. Hale

MLH

SUBJECT: New ACIR Draft Report

ACIR is looking for guidance before issuing their next draft report. Attached is a memo indicating some changes they are presently considering. My office is in the process of setting up a meeting for next week where we should discuss the ACIR proposal - please attend as I need to get back to them with some guidance.

Attachment

Manday Conf. call

Thurs/Fri
Agenc mts w/ Bill Davis
Disinfectant
Shells
fm + pio
General
- Labor
- environment
including

no current suits -
State and local gov'ts
Set down - talk through
these issues -
- no hearings
- outside mandate
- more balanced
- carbon / mislending
- fail to consider issues of a
affairs as working man and com
to directed by congress.
- general modification
- single for discussion
- current suits



ADVISORY
COMMISSION ON INTERGOVERNMENTAL RELATIONS
WASHINGTON, D.C. 20575

FAX TRANSMISSION

DATE:

4/22/96

MESSAGE SENT TO:

Marcia Hale

TELEPHONE:

456-7060

FAX:

456-6220

MESSAGE SENT FROM:

Bill Davis

U. S. Advisory Commission on Intergovernmental Relations
800 K Street NW
South Building, Suite 450
Washington, DC 20575

TELEPHONE: (202) 653-5540

FAX: (202) 653-5429

COMMENTS:

Suggested alternative positions for
a Commission final report.
What do you think?
Bill

NUMBER OF PAGES:

This is page one of 4 being transmitted.

FLSA *supported by regulation earlier than have been of #4*

Prelim. Rec'dation: Exempt state and local govt. employees from act.

Alternative Final Rec'dation: Recommend amendment of the Act to remove uncertainties relative to overtime provisions. (This would be a version of Option #4 contained in the Dec. 1 staff working paper.)

Statutory changes

FMLA *- Issuing a report - Employee survey - usage (Men, Women)*

Prelim. Rec'dation: Exempt state and local govt employees from Act.

Alternative Final Rec'dation: Recommend continued applicability of act to state and local govt. employees. (This would be the equivalent of adopting Option #1 contained in the Dec. 1 staff working paper.)

*Option 1
Vague
Inference*

OSHA

Prelim. Rec'dation: Exempt state and local govt employees from Act..

Alternative Final Rec'dation: Recommend commitment of federal \$ for training and technical assistance to states and to help finance state and local implementation.

Drug and Alcohol Testing

Prelim. Rec'dation: Exempt all state and local govt. employees from Act.

Alternative Final Rec'dation: Amend law to permit alternative testing requirements for small and isolated local governments, or to permit program certification in lieu of existing federal requirements. (This would be a version of Option #3 contained in the Dec. 1 staff working paper.)

*See
Dennis
paper*

Metric Conversion

Prelim. Rec'dation: Exempt states and local govts. from requirement to convert to metric.

Alternative Final Rec'dation: Find that extension of original requirement to year 2000 gives adequate time to implement. (This would be a version of Option #1 contained in the Dec. 1 staff working paper.)

-2-

Medicaid: Boren Amendment

Prelim. Rec'dation: Repeal Boren Amendment and make states solely responsible for determining Medicaid reimbursement rates.

Final Rec'dation: SAME

Clean Water Act

Prelim. Rec'dation: Restore federal cost sharing or give states and local governments greater authority to adopt their own control methods and timetables for implementing federal clean water standards.

Alternative Final Rec'dation: Increase federal funding for states and local governments to support construction of municipal wastewater treatment facilities. Amend clean water act to give EPA more flexibility to extend deadlines for compliance. (This would disconnect additional federal funding from the relaxation of federal standards. Rather than giving individual states and local governments discretion to determine their own methods and timetables, it would give EPA additional authority to do so.) *Should be capitalized. We oppose grant.*

Individuals With Disabilities Education Act

Prelim. Rec'dation: Increase federal funding to 40% authorized level or relieve states of responsibility to comply with administrative mandates. Require alternative dispute resolution practices. Prohibit individual suits against states or local governments.

Alternative Final Rec'dation: Increase federal funding to 40% authorized level. Relieve states and local governments from the requirements that are unrelated to the education of the child. Support increased use of mediation. (Eliminate any reference to individual suits.)

Americans With Disabilities Act

Prelim. Rec'dation: Increase federal funding to help states and local governments comply or modify requirements to meet state and local government technical and budget constraints. Designate a single federal ADA enforcement and assistance agency. Prohibit individual suits against states or local governments.

Alternative Final Rec'dation: Increase federal funding to help states and local governments comply. Support increased federal technical assistance and information to help states and local governments comply. Better coordinate federal enforcement and assistance. (Eliminate any reference to individual suits.)

-3-

The Safe Drinking Water Act

Prelim. Rec'dation: Enact amendments similar to those approved by Senate. Establish a goal of returning responsibility for standards to state governments.

Alternative Final Rec'dation: Enact amendments similar to those approved by Senate. Permit states increased flexibility for implementation of national standards.

Endangered Species Act

Prelim. Rec'dation: Give states and local governments a role in listing process. Apply exemptions more extensively.

Final Rec'dation: SAME

Advisory OK. veto - no

The Clean Air Act

Prelim. Rec'dation: Permit states to develop their own ways of meeting federal standards. Eliminate federal penalties where states are making "good faith" efforts.

Alternative Final Rec'dation: Make no change in existing federal standards. Increase federal aid and technical assistance to help states comply. (This would be a version of Option #1 in the Staff Working Paper.)

Davis-Bacon Related Acts

Prelim. Rec'dation: Amend Davis-Bacon related laws to exempt state and local construction projects below a larger dollar cost than now exists and below a certain federal percentage of cost sharing.

Alternative Final Rec'dation: Amend Davis-Bacon related laws to exempt state and local construction projects below a larger dollar cost than now exists and below a low federal percentage of cost sharing. (Eliminate the reference to the \$1M and 50% threshold in the text.)